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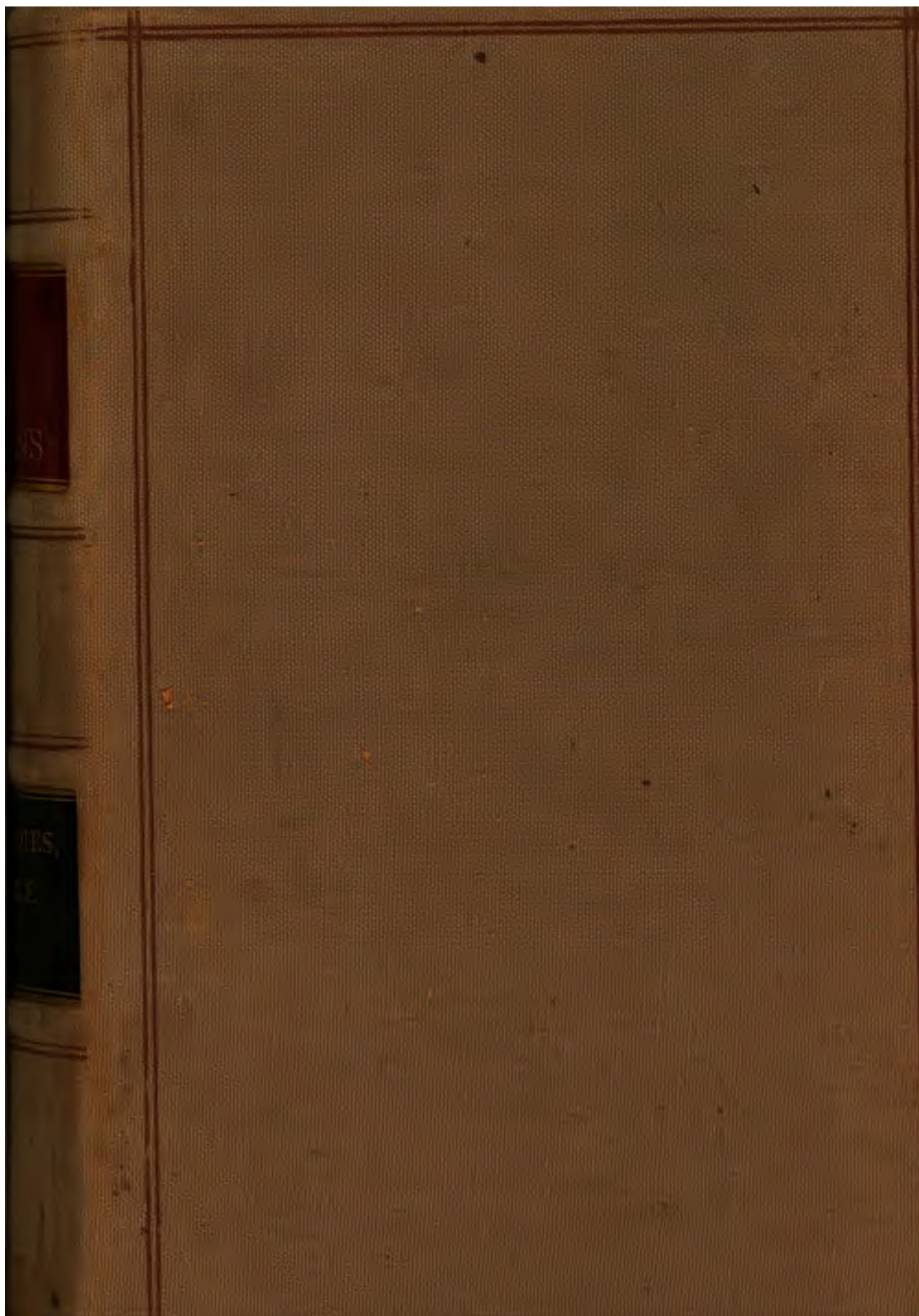
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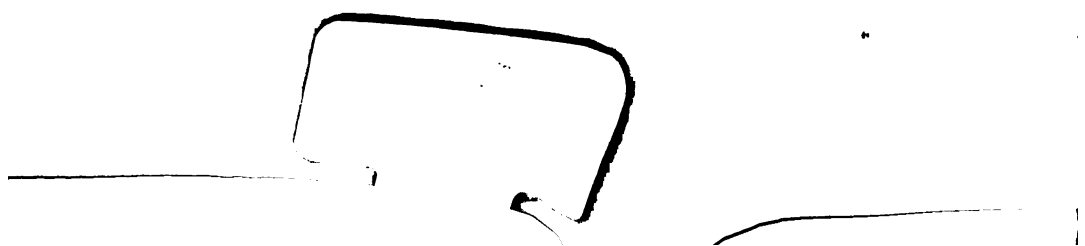
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ACTIONS
BY AND AGAINST
CORPORATIONS
AT LAW AND IN EQUITY

**EMBRACING ALSO CRIMINAL OFFENSES AND THE
CONSTITUTIONAL BASIS OF CORPORATION
ACTIONS AND DEFENSES**

BY
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PREFACE

In preparing this treatise the author has fully appreciated the difficulties which a subject of the nature of that covered presents in so far as the question of inclusion and exclusion of subject-matter, and drawing the line of demarkation is concerned. Not all cases in which corporations have brought suits or been sued are corporation actions or suits in the sense in which that term is or should be used. This is obvious. Great care has, therefore, been exercised in selection of the entire subject-matter of the work, with the endeavor on the part of the author to keep within the lines of inclusion and exclusion and still to present a satisfactory treatise. Having this question of selection constantly in mind the author has considered fully the principles upon which corporate actions are based, especially those constitutional principles which are the basis of corporation actions and defenses, since these must necessarily, at least in the majority of causes, be the first questions involved in corporation actions or suits, as is fully evidenced by the great and constantly growing number of corporation cases in the Supreme Courts of the United States, which are tested by the principles of constitutional law. The right of action and defenses in matters relating to the supervision and control of corporations by corporation and like commissions is a frequent source of litigation and presents a line of actions or suits peculiar to corporations and has therefore been fully considered. The treatment of these subjects and underlying principles, has been followed by jurisdiction of courts, not only over corporations, but also over corporation supervisory bodies

or commissions and the jurisdiction or powers of such bodies; the removal of suits; parties, including stockholders' rights and liabilities; and the various actions at law and in equity, including penalties, and criminal offenses, in which corporation questions have been involved. The author has personally written the entire work and has also personally examined the cases and asserts positively that every statement of law and the application of principles is fully and exactly supported by the citation given. The author trusts and believes that the profession will find the work practical, useful and satisfactory.

JOSEPH ASBURY JOYCE.

NEW YORK CITY, 1910

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JOYCE ON ACTIONS BY AND AGAINST CORPORATIONS

AT LAW AND IN EQUITY

EMBRACING ALSO CRIMINAL OFFENSES AND THE CONSTITUTIONAL
BASIS OF CORPORATION ACTIONS AND DEFENSES

CHAPTER I

CONSTITUTIONAL BASIS OF ACTIONS AND DEFENSES—FUNDAMENTAL GOVERNMENTAL POWERS

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|--|---------------------------------------|
| § 1. Preliminary Statement. | Governments Distinguished— |
| 2. Constitution and Laws of United States Supreme Law of Land. | Territories. |
| 3. Powers of Federal and State | § 4. Judicial and Legislative Powers. |
| | 5. Same Subject. |

SECTION 1. Preliminary Statement.

Inasmuch as one of the great causes or grounds of action or defenses in the case of corporations is that arising from some infringement or claimed infringement of their constitutional rights, we shall consider briefly the decisions and general governing principles based upon constitutional guarantees or the protection afforded by the Constitution, embracing generally the powers of the Nation and State, of Congress and of State legislatures, and the constitutionality of laws affecting corporations or their rights and remedies. In determining these points we are able to ascertain whether certain actions can or cannot be sustained against or by corporations, what causes of action exist and what defenses may be availed of. Again, the determination of the extent of the constitutional and legislative powers of States, not only in granting franchises but also in the matter of regulation and control of corpora-

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tions,¹ lies, in numerous cases, at the basis of corporate rights, remedies, actions and defenses, or is essential to the ascertainment thereof.

§ 2. Constitution and Laws of United States Supreme Law of Land.

The Constitution of the United States provides that: "The Constitution and the Laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."²

It is a general rule that, in so far as laws passed by Congress are constitutional and are enacted to carry out the powers vested in the Government of the United States, the States are not empowered to retard, burden or control the operations of such constitutional laws.³ So it necessarily follows from the position given by the Constitution to legislation in pursuance of it as the supreme law of the land, that where the power of the State and that of the Federal Government come in conflict the latter must control and the former yield. But on certain subjects the power of the State over them is plenary until Congress acts upon the subject, and the States also have, as will appear hereafter, full power within their limits to regulate matters of internal police.⁴ Again, when a State statute and a

¹ See Joyce on Franchises, §§ 132 *et seq.*, 364 *et seq.*

² Art. VI, par. 2, Const. U. S. See list of citations in Vol. I, Comp. Stat. U. S., 1901, under this article of the Constitution of the United States. Applied also per Mr. Chief Justice Waite in *Pensacola Teleg. Co. v. Western Union Teleg. Co.*, 96 U. S. 1, 24 L. ed. 708, 1 Am. Elec. Cas. 253.

The Government of the Union, though limited in its powers, is supreme within the sphere of its action, and its laws, when made in pursuance of the Constitution, form the supreme law of the land. *McCulloch v. Maryland*, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579.

³ *McCulloch v. State of Maryland*, 4 Wheat. (17 U. S.) 316, 4 L. ed. 579, cited and quoted from in *United States v. Rickert*, 188 U. S. 438, 439, 23 Sup. Ct. 480, 481, 47 L. ed. 536, 537, cited in *South Carolina v. United States*, 199 U. S. 437, 452, 24 Sup. Ct. 110, 50 L. ed. 261.

⁴ *Escanaba Company v. Chicago*, 107 U. S. 678, 683, 27 L. ed. 442, 2 Sup. Ct. 185, aff'g 12 Fed. 777. In this case a corporation owning steam vessels, and engaged in the carrying trade on Lake Michigan and navigable waters

Federal statute operate upon the same subject-matter, and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the State statute must give away.⁵ So, although legislation may be an exercise of the police power, which generally speaking belongs to the State, yet if it is an attempt in virtue of that power, to directly regulate commerce, so that there is a conflict between the powers claimed by the State and those which belong exclusively to Congress, the former must yield, by reason of the above constitutional provision.⁶ Again, in a case of a bill for an injunction to restrain the maintenance and use of a telegraph line, a State statute granting an exclusive right to maintain another telegraph line within a State was held in conflict with the Post Roads Act of Congress and Mr. Chief Justice Waite who delivered the opinion of the court declared that: "The government of the United States, within the scope of its powers, operates upon every foot of territory within its jurisdiction. It legislates for the whole nation and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all."⁷

connected with it, claimed to be impeded by obstructions, caused by the closing of draws of bridges under an ordinance of the city of Chicago at certain times and insisted that its navigation of the river should not be delayed as the rights of commerce by vessels were paramount to rights of commerce in other ways, and it was held that the waters in question, so obstructed as to their navigation, were navigable waters of the United States under control of Congress, in the exercise of its power under the commerce clause, but that until that body acted the State had plenary authority over bridges across them, and could vest in Chicago jurisdiction over their construction, repair and use within the city.

⁵ *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98, 30 L. ed. 910, 15 Sup. Ct. 802.

⁶ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 222, 29 Sup. Ct. 633, 634, a case of a statute relating to intoxicating liquors which was held in conflict with the Federal constitutional provision as to regulation of commerce. *Ky. Stat.*, 1903, § 1307.

⁷ *Pensacola Telegraph Co. v. Western Union Tele. Co.*, 96 U. S. 1, 24 L. ed. 708, 1 *Am. Elec. Cas.* 253.

As to Post Roads Act and hostile legislation see Joyce on Electric Law (2d ed.), §§ 65, 67.

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The above constitutional provision is not as to a State Supreme Court the law of a foreign jurisdiction in its application to the effect of a State statute affecting the right of carriers by express to establish reasonable delivery limits and to fix reasonable tolls, and the construction of a regulating statute as to interstate and intrastate shipments.⁸

§ 3. Powers of Federal and State Governments Distinguished—Territories.

The Government of the United States is one of enumerated powers. It has no inherent powers of sovereignty. The enumeration of the powers granted is to be found in the Constitution of the United States and in that alone. The manifest purpose of the Tenth Amendment to the Constitution is to put beyond dispute the proposition that all powers not granted are reserved to the people.⁹ A power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself. To preserve the even balance between the National and State Governments and to hold each in its separate sphere is the duty of all courts, and pre-eminently of the Federal Supreme Court. That which is implied is as much a part of the Constitution as that which is expressed, and amongst the implied matters is that the Nation may not prevent a State from discharging the ordinary functions of government, and no State can interfere with the National Government in the free exercise of the powers conferred upon it.¹⁰ While the Federal Government is one of enumerated powers specified in its Constitution, State Constitutions are limitations upon and not grants of legislative power.¹¹ And it may also be generally stated, in

⁸ *State ex rel. Railroad Commissioner v. Adams Express Co.* (Ind., 1908), 85 N. E. 966, 83 N. E. 337.

⁹ *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655; *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. 110.

¹⁰ *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. 110.

¹¹ *Alabama: State v. Skeggs* (Ala., 1908), 46 So. 268, 270; *Ensley Development Co. v. Powell*, 147 Ala. 300, 40 So. 137; *Dorsey, In re*, 7 Port (Ala.), 293.

California: City St. Improvement Co. v. Regents' University of Cali-

view of our republican form of government and of the powers reserved to the States or to the people under the Tenth Amendment to the Federal Constitution, that the legislative powers of a State in all matters of government are sovereign over all subjects and embrace all that are not forbidden by the Constitution of the State and of the United States.¹² In a Connecticut case

formis, 158 Cal. 776, 778, 96 Pac. 801 (the Constitution of the State being but a restriction upon the power of the legislature, the limitations therein contained will not be extended beyond the legitimate meaning and use of the terms employed, per *Henshaw, J.*); *Beals v. Amador County Supervisors*, 35 Cal. 624; *McCarthy, Ex parte*, 29 Cal. 395.

Colorado: *People ex rel. Rhodes v. Fleming*, 10 Colo. 553, 16 Pac. 298.

Florida: *Cotten v. Ponder*, 6 Fla. 610.

Illinois: *Harder's Fireproof Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245; *Winch v. Tobin*, 107 Ill. 212.

Indiana: *Hovey v. State*, 119 Ind. 395, 21 N. E. 21. Compare *State v. Denny*, 118 Ind. 449, 21 N. E. 274.

Iowa: *Eckerson v. City of Des Moines*, 137 Iowa, 452, 465, 115 N. W. 177; *Purcell v. Smidt*, 21 Iowa, 54.

Kentucky: *Bullitt, Sheriff, v. Sturgeon*, 32 Ky. L. Rep. 215, 105 S. W. 468; *Griswold v. Hepburn*, 2 Duv. (63 Ky.) 20.

Louisiana: *Hughes v. Murdock*, 45 La. Ann. 935, 13 So. 182.

Maine: *Winchester v. Corinna*, 55 Me. 9.

Michigan: *Attorney General v. Preston*, 56 Mich. 177, 22 N. W. 261.

Montana: *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462.

Nebraska: *State v. Moore*, 40 Neb. 854, 59 N. W. 755.

New Hampshire: *Concord Rd. v. Greeley*, 17 N. H. 47.

New York: *People v. Flagg*, 46 N. Y. 401; *Chenango Bank v. Brown*, 26 N. Y. 467.

Pennsylvania: *Lewis, Appeal of*, 67 Pa. St. 153.

South Carolina: *Lynch, Ex parte*, 16 S. C. 32.

Tennessee: *Stratton v. Morris*, 5 Pick. (89 Tenn.) 497, 12 L. R. A. 70, 15 S. W. 87.

Texas: *Solon v. State* (Tex. Cr. App., 1908), 114 S. W. 349; *Holly v. State*, 14 Tex. App. 505.

Utah: *Salt Lake City v. Christensen Co.*, 34 Utah, 38, 42, 95 Pac. 523.

Vermont: *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625.

Virginia: *Commonwealth v. Drewry*, 15 Gratt. (Va.) 1.

West Virginia: *Bridges v. Shallcross*, 6 W. Va. 562.

Wisconsin: *Bushnell v. Beloit*, 10 Wis. 195.

Compare *Leavenworth County Comm'rs v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *Cincinnati W. & Z. R. Co. v. Supervisors*, 1 Ohio St. 77.

¹² *United States*: *Platt v. Le Cocq* (U. S. C. C.), 150 Fed. 391 (legislation does not look to the Constitution for power to act but only to see if that instrument restricts or enlarges its powers).

Alabama: *Finklea v. Farish* (Ala., 1909), 49 So. 366 (Constitution is not

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it is held that the power of legislation vested by the Constitution in the General Assembly covers the whole field of legitimate

the source of legislative power, and there are no limits to the legislative power of the State government save such as are contained in the Constitution).

California: *Sheehan v. Scott*, 145 Cal. 684, 79 Pac. 350 (includes all powers not expressly prohibited or otherwise conferred); *Kingsbury v. Nye*, 9 Cal. App. 574, 581, 99 Pac. 985 (legislature within its sphere of action is omnipotent, save only as its power is restricted by the Constitution).

Colorado: *People ex rel. Rhodes v. Fleming*, 10 Colo. 553, 16 Pac. 298 (Constitution is not a grant but a limitation of power, and legislature has plenary power for all purposes of civil government).

Connecticut: *Booth v. Town of Woodbury*, 32 Conn. 118 (legislative power is limited only by Constitution of State and of United States and by principles of natural justice). See *Allyn's Appeal*, 81 Conn. 534, considered in text in this section.

Delaware: *State v. Fountain* (Del., 1908), 69 Atl. 926, 930 (legislative power is vested by Constitution in General Assembly and such grant is broad and general, and though limited by other constitutional provisions inconsistent therewith such limitations are not an enumeration of the only specific power).

Illinois: *Harder's Fireproof Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245 (legislature may exercise any power not prohibited by State or Federal Constitution); *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610 (State has supreme legislative power except so far as limited by Constitution, State or Federal, or such as has been delegated to general government).

Indiana: *State v. Goldhait* (Ind., 1909), 87 N. E. 133 (legislature is supreme except as limited by Constitution).

Iowa: *McGuire v. Chicago, Burlington & Quincy R. Co.*, 131 Iowa, 340, 108 N. W. 340 (State has sovereign legislative power over all subjects except such as are reserved by the State Constitution and subject to the power delegated expressly or by necessary implication to the Federal Government).

Kentucky: *Bullitt, Sheriff, v. Sturgeon*, 32 Ky. L. Rep. 215, 105 S. W. 468 (Constitution not a delegation of powers but a limitation and wherever it has not limited the right of the legislature to act it may act).

Missouri: *State ex rel. Hensen v. Sheppard*, 192 Mo. 497, 507, 91 S. W. 477 (may enact any law not prohibited by Constitution); *Roberts, Ex parte*, 166 Mo. 207, 65 S. W. 726 (same as preceding case).

Montana: *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462 (in the absence of some specific prohibition in the Constitution or the use in that instrument of terms which imply a prohibition the legislative power is supreme); *Missouri River Power Co. v. Steele*, 32 Mont. 433, 438, 80 Pac. 1093 (in the matter of legislation the people through the legislature have plenary power except in so far as inhibited by the Constitution).

Nevada: *Boyce, Ex parte*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47 (legislature has supreme power in all matters of government when not prohibited

legislation, except as that may be limited by other provisions of that Constitution or by the Federal Constitution; that, sub-

by constitutional limitations, and while powers of Federal Government are restricted to those delegated, those of State government embrace all not forbidden); *Wallace v. City of Reno*, 27 Nev. 71, 73 Pac. 628, 103 Am. St. Rep. 747, 63 L. R. A. 337 (have all power in matters of government unless limited by Constitution).

New York: *Ahern, Matter of, v. Elder*, 195 N. Y. 493, 500, 88 N. E. 1059, aff'g 115 N. Y. Supp. 1108 ("subject to the restrictions and limitations of the Constitution the power of the legislature to make laws is absolute and uncontrollable," per *Werner, J.*); *People v. Young*, 45 N. Y. Supp. 772, 18 App. Div. 162.

Ohio: *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564 (States' powers are sovereign except as limited and restrained by Federal and State Constitutions).

Pennsylvania: *Likins's Petition*, 223 Pa. 456 (whatever the people have not in their Constitution restrained themselves from doing, they, through their representatives in the legislature, may do); *Commonwealth v. Mallet*, 27 Pa. Super. Ct. 41 (except where Constitution has imposed limits upon the legislative power it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case).

South Dakota: *Watson, In re*, 17 S. Dak. 486, 97 N. W. 463 (there are no limitations on the power of the legislature except such as are imposed by the State and Federal Constitutions).

Tennessee: *Wright v. Cunningham*, 115 Tenn. 445, 91 S. W. 493 (legislature has all legislative powers except so far as restrained by Federal or State Constitutions expressly or by necessary implication); *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 159, 34 L. R. A. 725, 36 S. W. 1041.

Utah: *State v. Lewis*, 26 Utah, 120, 72 Pac. 388 (legislature power to legislate upon all subjects and for all purposes of civil government is absolute, inherent and plenary except as limited or controlled by the Federal or State Constitution); *Kimball v. Grantsville City*, 19 Utah, 368, 383, 57 Pac. 1, 45 L. R. A. 628 (where the State has committed its whole lawmaking power to the legislature, except such as is expressly or impliedly withheld by the State or Federal Constitution, it has plenary power for all purposes of civil government, and, therefore, in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of the government).

Virginia: *Willis v. Kalmbach* (Va., 1909), 64 S. E. 342 (as to matters not ceded to the Federal Government the legislative powers of the General Assembly are without limit except so far as restrictions are imposed by the State Constitution in express terms or by strong implication. The State Constitution is a restraining instrument only); *Norfolk, City of, v. Board of Trade & Business Men's Assoc.* (Va., 1909), 63 S. E. 987; *Conek v. Skeen* (Va., 1908), 63 S. E. 11 (legislature has full power to legislate on any subject unless prohibited by Constitution); *Whitlock v. Hawkins*, 105 Va. 242, 53 S. E. 401 (same as *Willis* case); *Brown v. Epps*, 91 Va. 726, 27 L. R. A.

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ject to these exceptions, any legislation is legitimate which is not inconsistent with a republican form of government.¹³ The power of legislation may be taken away from the lawmaking body as well by implication as by express prohibition, and prohibitions against legislation are equally as effectual as when they are express, and are to be regarded in the one case no less than in the other.¹⁴ Another factor of importance is that the first eight articles of the Amendments to the Federal Constitution have reference to the powers exercised by the Government of the United States and not to those of the States.¹⁵ As to Territories Congress has only reserved a revisory power over territorial legislation, and a statute duly enacted, and within the legislative power of the Territory, remains in full force until Congress annuls it by exerting such power.¹⁶

676, 21 S. E. 119 (Constitution is restraining instrument, and legislature possesses all legislative power not prohibited by Constitution).

Washington: State v. Clark, 30 Wash. 439, 71 Pac. 20 (absence in Constitution of specially delegated power to legislature is not a restriction).

Wisconsin: Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905 (no specific enabling provision required to enable legislature to make all laws necessary and proper to carry into execution the powers which the Constitution vests in the State government); State v. Redmon, 134 Wis. 89, 114 N. W. 137 (general declaration in Constitution of the purposes of civil government is a limitation upon legislative power designed, at least in part, to prevent clearly unreasonable enactments restricting natural private rights).

Government of United States is one of enumerated powers specified in the Federal Constitution and differs in this respect from State Constitutions which are not grants of power to the States, but apportion and impose restrictions upon the powers which the States inherently possess. *Evers v. Hudson*, 36 Mont. 135, 149, 92 Pac. 462.

"It is fundamental in our system of government that all powers not delegated to the United States by the terms of the Federal Constitution and its amendments, nor prohibited by it to the States are reserved to the States or to the people (Const. U. S., Amdt. X). Subject to the authority thus expressly or by necessary inference delegated to the Federal Government, the State has sovereign legislative power over all subjects except such as are withheld by the Constitution of the State itself." *McGuire v. Chicago, Burlington & Quincy Rd. Co.*, 131 Iowa, 340, 349, 108 N. W. 340, per Weaver, J.

¹³ *Allyn's Appeal*, 81 Conn. 534.

¹⁴ *Cain v. Smith*, 117 Ga. 902, 44 S. E. 5.

¹⁵ *Lloyd v. Dollison*, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. 703.

¹⁶ *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, 213 U. S. 55, 53 L. ed.

§ 4. Judicial and Legislative Powers.¹⁷

The boundaries between legislative and judicial fields should be carefully observed.¹⁸ A judicial inquiry declares and enforces liabilities as they stand on present or past facts and under existing laws while legislation looks to the future and changes conditions making new rules thereafter to be applied to all or some part of the subject of its powers.¹⁹

In a qualified sense and to a limited extent the separate States are sovereign and independent, and the relations between them partake something of the nature of international law. The Supreme Court of the United States in appropriate cases enforces the principles of that law and in addition by its decisions of controversies between two or more States is constructing what may not improperly be called a body of interstate law.²⁰

By the Constitution the entire judicial power of the United States is vested in its courts.²¹

But the judicial power of the United States extending by the Constitution to controversies between citizens of different States, as well as to cases arising under the Constitution, treaties and laws of the United States, the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are mere matters of legislative discretion.²²

No State or Territory can pass laws having force or effect

695, 29 Sup. Ct. 397, citing *Miners' Bank v. Iowa*, 12 How. (53 U. S.) 1, 8, 13 L. ed. 867.

¹⁷ See § 10, herein.

¹⁸ *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 53 L. ed. 196, 29 Sup. Ct. 55, rev'g 15 Hawaii, 553.

¹⁹ *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150, cited in *Louisville & Nashville Rd. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 147, 29 Sup. Ct. 146, 53 L. ed. 441, as stating to what extent a court may be made an instrumentality in the administration of the laws of a State.

²⁰ *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655.

²¹ *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. 655. See also as to Art. III, § 2, of Constitution, *Home Ins. Co. v. Northwestern Packet Co.*, 32 Iowa, 233, 236.

²² *Railway Co. v. Whitton*, 13 Wall. (80 U. S.) 270, 20 L. ed. 571.

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over persons or property beyond its jurisdiction;²³ and no legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with fundamental law, as such an idea is in opposition to the theory of our institutions, as the duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.²⁴

But the Federal Supreme Court will not limit the power of a State by declaring that because the judgment exercised by the legislature is unwise it amounts to a denial of the equal protection of the laws or deprivation of property or liberty without due process of law.²⁵ And when an act of the legislature is challenged in a court its inquiry is limited to the question of power; and as the courts will not otherwise interfere with the action of the legislature, it will be presumed that the legislature never intends to interfere with the action of the courts, or to assume judicial functions to itself.²⁶ The constitutional right of Congress to enact legislation in regard to a matter wholly within its jurisdiction is the sole measure by which the validity of such legislation is to be determined by the courts; and the courts cannot proceed upon the supposition that harm will follow if the legislature be permitted full sway and, in order to correct the legislature, exceed their own authority, and assume that wrong may be done in order to prevent wrong being accomplished. Nor can the courts make mere form and substance the test of the constitutional power of Congress to enact a statute in regard to a matter over which Congress has absolute control.²⁷

²³ *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. 397, case affirms 99 S. W. 190.

²⁴ *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, 30 *Chicago Leg. News*, 243, 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197.

²⁵ *Heath & Mulligan Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. 114.

²⁶ *Angle v. Chicago, St. Paul, M. & O. Ry. Co.*, 151 U. S. 1, 38 L. ed. 5, 14 Sup. Ct. 240.

²⁷ *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. 671, aff'g 155 Fed. 428. "But as was pointed out in *Cary*

Sofar, however, as the Federal Constitution is concerned a State may, by constitutional provisions, unite legislative and judicial power in the same body.²⁸ And there is nothing in the Federal Constitution, which forbids a State legislature to exercise judicial powers;²⁹ nor is there any provision in said Constitution which directly or impliedly prohibits a State, under its own laws, from conferring upon nonjudicial bodies certain functions that may be called judicial.³⁰

§ 5. Same Subject.³¹

Proceedings legislative in nature are not proceedings in a court within the meaning of the Revised Statutes, § 720, no matter what may be the general or dominant character of the body in which they take place.³² But the power to regulate the operation of railroads is legislative in character, and the

v. Curtis, 3 How. (44 U. S.) 236 (11 L. ed. 576), and as has been often since emphasized by this court [*McCray v. United States*, 195 U. S. 27 (24 Sup. Ct. 748, 49 L. ed. 65)], the proposition but mistakenly assumes that the courts can alone be safely intrusted with power and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished." *Id.*, 340, per Mr. Justice White.

As to engrafting a limitation on a statute being pure judicial legislation see § 49, herein, point (1) of text.

²⁸ *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

²⁹ *Satterlee v. Matthewson* (1829), 2 Pet. (27 U. S.) 380, 7 L. ed. 458. While the legislature may commit to judicial tribunals the investigation of facts and the granting of decrees it may exercise that power itself. Syllabus in *Mitchell v. Mitchell*, 107 N. Y. Supp. 671.

³⁰ *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 552, 52 L. ed. 327, 29 Sup. Ct. 178, aff'g 66 Atl. 790. "It is said that the statute, in providing for the production of books and papers" by a corporation doing business in the State, "includes not only the court and grand jury but any tribunal or commission authorized by the State. There is nothing, as we have said, in the Federal Constitution which prevents it." *Id.*, 552, per Mr. Justice Peckham.

³¹ See § 10, herein.

³² *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150, cited in *Louisville & Nashville Rd. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 147, 29 Sup. Ct. 146, 53 L. ed. 441, as stating to what extent a court may be made an instrumentality in the administration of the laws of a State.

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legislature itself may exercise it or may delegate its execution in detail to an administrative body, and where the legislature has not delegated such regulation the power of regulation cannot be exercised by the courts.³³

In Connecticut attempts to confer by statute upon the Superior Court essentially legislative or administrative powers are inoperative. But while such a court does not possess legislative or administrative powers yet it may in the exercise of its judicial powers restrain the unlawful exercise of legislative or administrative powers by executive officers, municipal councils, or administrative boards.³⁴ Again, a State statute cannot, contrary to a constitutional provision confiding the executive, legislative and judicial powers each to a separate magistracy and vesting the judicial power in specified courts and such inferior courts as the legislature shall from time to time establish, compel either the courts or judges thereof, when acting judicially, to exercise powers which are essentially and distinctively legislative and the execution of which are not incidental to the discharge of any legislative function, and this applies where the power of regulating the location, construction and operation of street railways given to local municipal authorities by a State statute clearly falls within the limits of the judicial department. The fact that a right of appeal to a court or any judge thereof is given by the statute in case the municipal authorities fail to exercise their powers within a limited time does

³³ *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 53 L. ed. 186, 29 Sup. Ct. 55, rev'g 15 Hawaii, 553.

³⁴ *New York, New Haven & Hartford Rd. Co.'s Appeal*, 80 Conn. 623, 626, 639, 641, 70 Atl. 26 (case of appeal from refusal of city to approve plan and method submitted by railroad company for erection and maintenance of overland electric transmission lines; the construction of statutes giving control to municipal authorities, and power to compel placing electric wires under ground; the nature of the powers of the Superior Court, and how invoked; the nonvalidity of statutes conferring powers essentially legislative or administrative; retrial and determination by railroad commissioners, by local municipal authorities, of action on matters relating to street railways; the right of "appeal"; the power of the trial judge to entertain application to determine judicial question as to nature and extent of powers of common council, and his error in holding that common council had no power to make the order in question).

not make the exercise of such power of regulation a judicial function, as the appeal so provided does not constitute a process to invoke the judicial power, but it is merely an application to the court or judge, to exercise a legislative function in the place or stead of the municipal authorities.³⁵ Where a general provision in the Constitution of a State is void as taking property without due process or compensation, and compensation has not been provided by statute, the defect cannot be cured by the courts inserting provisions for compensation in judgments under such constitutional provisions.³⁶ Another factor of importance in connection with legislative powers is that Congress has reserved a revisory power over territorial legislation, and a statute duly enacted, and within the legislative power of the Territory, remains in full force until Congress annuls it by exerting such power. But it is also true that the passage of a legislative act of a Territory is the exercise of authority under the United States. So where Congress confers on a Territory legislative power extending to all rightful subjects of legislation, the Territory has authority to legislate concerning personal injuries and rights of action relating thereto.³⁷

* *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794. See also *Steenerson v. Great Northern R. Co.*, 69 Minn. 353, 72 N. W. 713, 8 Am. & Eng. R. Cas. (N. S.) 559.

Under the Constitution of Connecticut, which confides the power of government to three separate and distinct departments, the legislative, the executive, and the judicial, the General Assembly cannot authorize the courts to exercise powers which are clearly administrative and not incidental to the discharge of any legitimate judicial function. *Spencer's Appeal*, 78 Conn. 301.

* *Louisville & Nashville Rd. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. 146, rev'g 97 S. W. 778.

* *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 645, 29 Sup. Ct. 397, aff'g 99 S. W. 190, citing to the first point, *Miners' Bank v. Iowa*, 12 How. (53 U. S.) 1, 8, 13 L. ed. 867; to the second point, *McLean v. Denver & Rio Grande Rd. Co.*, 203 U. S. 38, 47, 51 L. ed. 78, 7 Sup. Ct. 1; and applying the last point to the legislative power of New Mexico under act of September 9, 1850, c. 49, 9 Stat. 446.

CHAPTER II

CONSTITUTIONAL BASIS OF ACTIONS AND DEFENSES—REGULATION AND CONTROL ¹

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| § 6. Power to Regulate and Control—Generally. | § 13. Classification Statutes—Fourteenth Amendment. |
| 7. Police Power—General Principles as to Extent of. | 14. Same Subject. |
| 8. Same Subject—Limitations. | 15. Police Power—Regulation of Slaughter Houses and Stock Yards. |
| 9. Same Subject—Limitations Continued. | 16. Regulation and Control—Insurance Companies. |
| 10. Same Subject—Legislative Discretion—Interference of Courts. | 17. Same Subject. |
| 11. Liberty to Contract—Interstate Commerce—Police Power—Anti-trust Act—Combinations. | 18. Regulation and Control—Instances—Mines—Hours of Labor—Water Companies—Adulteration—Ship Passenger Laws—Patent Rights. |
| 12. Liberty to Contract Continued—Police Power—Sales on Margins—Limitation of Liability—Mechanics' Liens—Insurance. | 19. Regulation and Control—Foreign Corporations—Rule. |
| | 20. Same Subject—Limitations Upon Rule. |

§ 6. Power to Regulate and Control—Generally.

The legislature of a State stands for the entire public, and it has full power within constitutional limitations and within reasonable limits, to regulate and control public employments and property used in connection therewith, and the owner of property devoted to public use, must for the common good submit to have that use and employment regulated by public authority.²

A corporation is subject to such reasonable regulations, as the legislature may from time to time prescribe, as to the general conduct of its affairs, serving only to secure the ends for

¹ See § 1, herein.

² Joyce on Electric Law (2d ed.), § 143; Joyce on Franchises, §§ 364 *et seq.*

which it was created, and not materially interfering with privileges granted to it.³ Legislative power to create corporations implies the power to thereafter prescribe reasonable regulations, even though the right to repeal or amend the charter is not reserved by the State.⁴ And State legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection provisions of the Fourteenth Amendment to the Federal Constitution.⁵

It is also within the power of a State, as guardian and trustee for its people and having full control of its affairs, to prescribe the conditions upon which it will permit public work to be done on behalf of itself or its municipalities.⁶

§ 7. Police Power—General Principles as to Extent of.

The term police power is difficult to define, but the following general principles have been asserted by the courts and show, in some measure, the extent of the right to exercise the same and the limitations thereon. It may first be stated that this power is one which generally speaking belongs to the States,⁷ that is, it is reserved to the States and there is no grant thereof to Congress in the Constitution.⁸ Each State has, therefore, the power never surrendered to the Government of the Union to guard and promote the public interests by reasonable police regulations that do not violate the Constitution of the United States or of the States.⁹ The police power is also one of the most essential

³ *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. ed. 1084.

⁴ *McGuire v. Chicago, Burlington & Quincy Rd. Co.*, 131 Iowa, 340, 108 N. W. 902.

⁵ *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. 114; following *Ozan Lumber Co. v. Union County Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. 89.

⁶ *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148, aff'g *State v. Atkins*, 64 Kan. 174, 67 Pac. 519, 97 Am. St. Rep. 343.

⁷ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 222, 29 Sup. Ct. 633, 64, 53 L. ed. 972, per Mr. Justice Brewer. See *New York v. Miln*, 11 Pet. (36 U. S.) 102, 9 L. ed. 648.

⁸ *Selliger v. Kentucky*, 213 U. S. 200, 29 Sup. Ct. 449, 53 L. ed. 761.

⁹ *Chicago, Burlington & Quincy Ry. Co. v. Drainage Comm'rs*, 200 U. S.

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of governmental powers, at times one of the most insistent, and always one of the least limitable.¹⁰ All rights are held subject to the police power of the State, and if the public safety or the public morals require the discontinuance of any manufacture or traffic the legislature may provide therefor notwithstanding individuals or corporations may thereby suffer inconvenience.¹¹ This power embraces regulations by a State, designed to promote the public convenience or the general prosperity as well as those intended to promote public health, morals, or safety; it is not confined to what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the State.¹² Again, whatever is contrary to public policy or inimical to the public interests is subject to the police power and is within the State's legislative control.¹³ It is held in a late Connecticut case that the term police power has, at bottom, no other meaning than the general power of governing its people and dominions belonging to every sovereign.¹⁴ And in a recent Wisconsin case it is determined that the police power is the power to make all laws which in the contemplation of the Constitution

561, 584, 50 L. ed. 596, 26 Sup. Ct. 341 (case affirms 212 Ill. 103, 72 N. E. 219), per Mr. Justice Harlan, citing *New York, New Haven & Hartford Rd. Co. v. New York*, 165 U. S. 628, 631, 41 L. ed. 853, 17 Sup. Ct. 418; *Hennington v. Georgia*, 163 U. S. 299, 308, 309, 16 Sup. Ct. 1086, 41 L. ed. 166; *Morgan v. Louisiana*, 118 U. S. 455, 464, 6 Sup. Ct. 1114, 30 L. ed. 237; *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. ed. 1115; *Railroad Co. (Hannibal & St. Joseph Rd. Co.) v. Husen*, 95 U. S. 465, 472, 24 L. ed. 527; *Gibson v. Ogden*, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

See also as to extent, nature and definitions of police power, *Joyce on Franchises*, § 366.

¹⁰ *District of Columbia v. Brooke*, 214 U. S. 138, 29 Sup. Ct. 560, 53 L. ed. 941.

¹¹ *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989.

¹² *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499, case affirms *Walker v. Bacon*, 11 Idaho, 127, 81 Pac. 155. See also *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. 358; *New York v. Miln*, 11 Pet. (36 U. S.) 102, 9 L. ed. 648; *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 322; *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 107 N. W. 500.

¹³ *Louisville & Nashville Rd. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714.

¹⁴ *Allyn's Appeal*, 81 Conn. 534.

promote the public welfare, and the controlling question in determining the scope of the police power is whether the manner of dealing with the subject in the particular case so passes the boundaries of reason as to overstep some constitutional limitation, express or implied.¹⁵ Under a Nebraska decision the essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.¹⁶ The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based; the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution.¹⁷

§ 8. Same Subject—Limitations.

Although a State may, in the exercise of its police power, enact such laws relating to persons and property within its territorial limits as shall best promote the general prosperity and the public health, safety and morals, nevertheless it cannot encroach upon the powers of the Federal Government so as to impair or materially destroy rights granted or secured by constitutional acts of Congress or granted under a constitutional exercise of power, and this is especially true of the constitutional right to regulate commerce.¹⁸ It is held, however, in a

¹⁵ *State ex rel. Northern Pac. Ry. Co. v. Railroad Commission* (Wis., 1909), 121 N. W. 919.

¹⁶ *Chicago, Burlington & Quincy Rd. Co. v. Nebraska*, 47 Neb. 549, 3 Am. & Eng. R. Cas. (N. S.) 573, 41 L. R. A. 481, 66 N. W. 624.

¹⁷ *St. Paul, Minneapolis & Manitoba Ry. Co. v. Minnesota*, 214 U. S. 497, 29 Sup. Ct. 698, 53 L. ed. 1060, aff'g *Northern Pacific Ry. v. Duluth*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341, as the principal case involved a question almost the same.

¹⁸ *Western Union Teleg. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. ed. 1105, 6 Am. Elec. Cas. 858, 861, per Mr. Justice Peckham. See *People v. Hawkins*, 47 N. Y. Supp. 56, 20 N. Y. App. Div. 494, citing *Walling v. Michigan*, 116 U. S. 446, 460, 29 L. ed. 691, 696, 6 Sup. Ct. 454; *People v.*

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Federal Circuit Court case, that the police power is inherent in the States, and is not affected by the interstate commerce provision nor by the Post Roads Act.¹⁹ Again, in a late Federal Supreme Court case, it is determined that generally speaking the police power belongs to, and is to be exercised, by the State, but it must yield to Congress wherever it conflicts with the powers belonging exclusively to Congress.²⁰ So in another Federal case it is held that the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of the people, provided, however, that the exercise of such power does not come in conflict with the powers, as exercised by Congress under the Federal Constitution making laws of the United States passed in pursuance thereof supreme with relation to the States.²¹ Notwithstanding the general police power is reserved to the States it is subject to this limitation, that it may not trespass on the rights and powers vested in the National Government;²² and it must be exercised in subordination to the Constitution,²³ for it is not above the express or necessarily implied constitutional prohibitions.²⁴ And neither the unlimited powers to tax, nor any of

Gilson, 109 N. Y. 389, 401, 4 Am. St. Rep. 465, 17 N. E. 343; *New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *Brennan v. Titusville*, 153 U. S. 289, 299, 4 Inters. Comm. Rep. 658, 38 L. ed. 719, 722, 14 Sup. Ct. 829; *Jacobs*, In re, 98 N. Y. 98, 108, 50 Am. St. Rep. 636. Examine *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

¹⁹ *Western Union Teleg. Co. v. Mayor of New York*, 38 Fed. 552, 2 Inters. Comm. Rep. 533, 3 L. R. A. 449, 6 Ry. & Corp. L. Jour. 105, 2 Am. Elec. Cas. 195.

²⁰ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. ed. 972.

²¹ *Escanaba Company v. Chicago*, 107 U. S. 678, 683, 27 L. ed. 442, 2 Sup. Ct. 185 (applied to the power of the State to regulate and control the construction, use and repair of bridges, by delegation of its authority to a municipal body of such power, over bridges within the city limits, even though over navigable waters, provided, however, that Congress has not acted in the matter under the commerce clause of the Constitution.

²² *Heff, Matter of*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. 506.

²³ *Stehmeyer v. Charleston*, 53 S. C. 259, 31 S. E. 222.

²⁴ *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500.

its large police powers, can be exercised to such an extent by the State as to work a practical assumption of the powers conferred by the Constitution upon Congress.²⁶ Nor should there be an arbitrary invasion of personal rights or of private property, nor should such burdens be imposed upon property rights that the owner will thereby be unlawfully deprived of the same.²⁶

§ 9. Same Subject—Limitations Continued.

In New York the Federal and State Constitutions control the exercise of the police power; and the public generally rather than the interests of a particular class must be considered; the exercise of the power must not be unnecessarily or unduly oppressive but must be reasonable in its application, while the public safety, welfare, health and morals must be protected, nor can the liberty or property rights of individuals be arbitrarily taken away, nor can they unreasonably be restricted or prevented from exercising any particular profession or lawful occupation or pursuit or contracting concerning the same.²⁷ And in another case it is held that the exercise of the police power may and should have reference to the peculiar situation and needs of the community, and is not necessarily invalid because it may have the effect of levying a tax upon the property affected, if its main purpose is to protect the people against fraud and wrong.²⁸ So in Wisconsin this power is limited to the extent that the exercise thereof must be reasonable both as to the regulation itself and the subjects to be regulated.²⁹ But uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking

²⁶ *Railroad Co. (Hannibal & St. Joseph Rd. Co.) v. Husen*, 95 U. S. 465, 24 L. ed. 527.

²⁷ *Chicago, Burlington & Quincy Rd. Co. v. State*, 47 Neb. 549, 66 N. W. 624.

²⁸ *People v. Murphy*, 113 N. Y. Supp. 855, 129 App. Div. 260, rev'g 113 N. Y. Supp. 854, 60 Misc. 536, aff'd 88 N. E. 17; *O. J. Gude & Co. v. Murphy*, 113 N. Y. Supp. 860, 129 App. Div. 266, aff'd 88 N. E. 21.

²⁹ *McLean v. Denver & Rio Grande R. Co.*, 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. 1, aff'g 78 Pac. 74.

³⁰ *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500.

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of property without due compensation, and the constitutional prohibition against the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor that general power over private property which is necessary for the orderly existence of all governments.³⁰ The Fourteenth Amendment to the Constitution does not limit the subjects in relation to which the police power may be exercised for the protection of its citizens.³¹ And restraints upon the proper exercise of this power by the States are not imposed by the due process of law clause of the Federal Constitution.³²

So the interdiction of statutes impairing the obligation of contracts does not prevent a State from properly exercising its police powers for the public good notwithstanding contracts previously entered into between individuals may be affected.³³

§ 10. Same Subject—Legislative Discretion—Interference of Courts.

While the police power of the State is subject to limitations there is a wide discretion as to its exercise in the legislature, with whose determination as to what is and what is not necessary the courts ordinarily will not interfere, except where property is taken for which compensation must be made, private interests are subservient to the police power and must give way to general schemes for the public health.³⁴ So in New Jersey the public policy of that State is a creature of the legislature, the courts do not form it but merely take cognizance thereof

³⁰ *Chicago, Burlington & Quincy Rd. Co. v. Drainage Comm'rs*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. 341, aff'g 212 Ill. 103, 72 N. E. 219.

³¹ *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. 207, considering and following *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. 730; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. 357.

³² *Sprigg v. Garrett Park*, 89 Md. 406, 411, 43 Atl. 813.

³³ *Manigault v. Springs*, 198 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. 127.

³⁴ *Manigault v. Springs*, 198 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. 127. See §§ 4, 5, herein.

the same as in case of other public laws.³⁵ Again, it is held that in the exertion of its police power the legislature is vested with a large discretion, which, if exercised *bona fide* for protection of the public, is beyond the reach of judicial inquiry.³⁶ But a wide range of discretion is necessary to make legislation practical and the courts cannot be made a refuge from ill-advised, unjust or oppressive laws.³⁷ It has also been decided, that inasmuch as the range of the States' police power comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.³⁸ And generally, when and how far this power may be legitimately exercised by a State must be left for determination in each case as it arises.³⁹ The police power may, it is held, be asserted directly by the legislature, or may, in the absence of constitutional restrictions, be delegated to several municipal corporations or other agencies provided for its exercise.⁴⁰

§ 11. Liberty to Contract—Interstate Commerce—Police Power—Anti-Trust Act—Combinations.

The United States Supreme Court recognizes in its decisions the broad principle of the freedom of commerce between the States, and the right of citizens of one State to freely contract and receive and send merchandise from and to another State,

³⁵ *Bigelow v. Old Dominion Copper Mining & Smelting Co.* (N. J. Ch.), 71 Atl. 153.

³⁶ *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714 (a case of railroad competition; consolidation of parallel lines; construction of charter power to unite with other roads as not authorizing purchase or lease, or any union of franchises; construction of State statute as not authorizing purchase of other or parallel lines, and constitutional provision forbidding consolidation as constituting legitimate exercise of the police power of the State).

³⁷ *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. 560, rev'g 29 App. D. C. 563.

³⁸ *Railroad Co. (Hannibal & St. Joseph Rd. Co.) v. Husen*, 95 U. S. 465, 24 L. ed. 527.

³⁹ *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832.

⁴⁰ *Chicago, Burlington & Quincy Rd. Co. v. Nebraska*, 47 Neb. 549, 3 Am. & Eng. R. Cas. (N. S.) 573, 41 L. R. A. 481, 66 N. W. 624.

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and also the want of power of one State to destroy contracts concerning interstate commerce, valid in the States where made.⁴¹

The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was not intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse. Accordingly, a contract between a railroad company and an elevator company, that the latter company, in consideration of erecting and using for that purpose an elevator, should have for a prescribed term the handling, at a stipulated price, of all grain brought by the railroad company in its cars to the city of Dubuque, on the Mississippi River, to be transmitted to a place beyond, did not cease to be valid and binding upon the parties because afterwards, by the construction of a railroad bridge across the Mississippi at Dubuque, it became unnecessary for the railroad company or its lessee, and a useless expense to it, to have the grain brought by it to Dubuque handled at that place. The enforcement of the contract after the construction of the bridge was not an interference with the power of Congress to regulate commerce between the States.⁴² Congress may, however, under the commerce clause of the Federal Constitution enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract shall be, when carried out, to directly and not as a mere incident to other and innocent purposes, regulate to any extent interstate or foreign commerce. And although the provision in the Constitution regarding the liberty of the citizen is to

⁴¹ *Adams Express Co. v. Iowa*, 196 U. S. 147, 49 L. ed. 424, 25 Sup. Ct. 185; *American Express Co. v. Iowa*, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. 182; *Vance v. Vanderhook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. ed. 1100; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. ed. 1088; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 Sup. Ct. 681; *Bowman v. Chicago*, 125 U. S. 465, 31 L. ed. 700, 8 Sup. Ct. 689, 1062.

⁴² *Railroad Co. v. Richmond*, 19 Wall. (86 U. S.) 584, 22 L. ed. 173.

some extent limited by this commerce clause, still the power of Congress to regulate commerce comprises the right to enact a law prohibiting a citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally regulate to a greater or less degree, commerce among the States.⁴³ So even though there is a certain freedom of contract which the States cannot destroy by legislative enactment, in pursuance whereof parties may seek to further their business interests, the police power of the States extends to and may define and prohibit, under penalties, trusts or secret arrangements by which, although there is no merger of interests through partnerships or incorporation, an apparently existing competition among all the dealers in a community in one of the necessities of life is substantially destroyed; and such an enactment is not in conflict with the Fourteenth Amendment as to a person convicted of combining with others to pool and fix the price, divide the net earnings and prevent competition in the purchase and sale of grain.⁴⁴ So a State statute prohibiting combinations of insurance companies as to rates, commissions, and manner of transacting business is not unconstitutional as depriving the companies of their property or of their liberty of contract,

⁴³ *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 1, 44 L. ed. 136, 30 Sup. Ct. 96. In this case it was held that under the act of Congress of July 2, 1890, c. 647, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, thereby regulates interstate commerce to that extent, and thus trenches upon the power of the National Legislature, and violates the statute. The contracts considered in this case relate to the sale and transportation to other States of specific articles, not incidentally or collaterally, but as a direct and immediate result of the combination entered into by the defendants; and they restrained the manufacturing, purchase, sale or exchange of the manufactured articles among the several States, and enhanced their value, and thus came within the provisions of said act; and when the direct, immediate and intended effect of a contract or combination among dealers in a commodity is the enhancement of its price, it amounts to a restraint of trade in the commodity, even though contracts to buy it at the enhanced price are being made.

⁴⁴ *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. 276.

within the meaning of the Fourteenth Amendment, and the auditor of the State will not be enjoined from enforcing the provisions of the statute.⁴⁵

§ 12. Liberty to Contract Continued—Police Power—Sales on Margins—Limitation of Liability—Mechanics' Liens—Insurance.

A State constitutional provision may prohibit sales on margins without intrenching upon the liberty of contract, and such prohibition is not contrary to the first section of the Fourteenth Amendment.⁴⁶ Nor is a statute declaring invalid any contract limiting the liability of a railway company for the negligence of a fellow servant an unwarranted interference with the right of private contracts; nor is such enactment an arbitrary and unreasonable exercise of the police power of the State.⁴⁷ Nor is liberty to contract unreasonably interfered with, nor is the owner deprived of his property without due process of law by a State statute relating to the filing and enforcement of mechanics' liens, and such enactment is not unconstitutional.⁴⁸ Again, a State statute which provides that any person, firm or corporation, who in any manner whatever does an act in the State, to effect for himself or another, insur-

⁴⁵ *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. 66.

⁴⁶ *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. ed. 323, aff'g 130 Cal. 322, 62 Pac. 521, 927 (under Art. IV, § 26, Const. Cal., providing that "all contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it, by suit in any court of competent jurisdiction"). See *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. 425.

⁴⁷ *McGuire v. Chicago, Burlington & Quincy Rd. Co.*, 131 Iowa, 340, 108 N. W. 902, and cases cited *Id.*, 383.

⁴⁸ *Great Southern Fireproof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. 576.

When State labor law limiting hours of work is not a legitimate exercise of the police power of the State, but an unnecessary, unreasonable and arbitrary interference with the right and liberty of the individual to contract, in relation to labor, and as such in conflict with and void under, the Federal Constitution. *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 93; § 110, Labor Law of N. Y.

ance on property then in the State, in any marine insurance company which has not complied in all respects with the laws of the State, shall be subject to a fine, etc., is; when applied to a contract of insurance made in another State with an insurance company of such State, where the premiums were paid and where the losses were to be paid, a violation of the Constitution of the United States.⁴⁹

§ 13. Classification Statutes—Fourteenth Amendment.

The difference between the extent of the power which the State may exert over the doing of business within its borders by an individual, and that which it can exercise as to corporations, furnishes a distinction authorizing a classification between the two which does not violate the equal protection clause of the Fourteenth Amendment.⁵⁰ So a reasonable classification of persons according to occupation, business or other circumstances, for legislative purposes, by which all persons of that class are affected alike, is not a violation of the Fourteenth Amendment to the Federal Constitution, or of a corresponding provision of a State Constitution.⁵¹ It is also a

* *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207, distinguished, and held that above decision is not intended to shake its authority.

The business of insurance is not commerce. See § 55, herein, as to interstate commerce insurance.

* *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. ed. 530.

* *McGuire v. Chicago, Burlington & Quincy Rd. Co.*, 131 Iowa, 340, 108 N. W. 902. The court, per Weaver, J. (at p. 350), says: "But the reasonable classification of persons for the purposes of legislation, according to occupation, business, or other circumstances, by which one class or portion of the people is differentiated from other portions or classes, has often been held not to be a violation of this constitutional guaranty. The mere fact that legislation is special, and made to apply to certain persons and not to others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions. * * * Such also has been the uniform holding of this court with reference to the corresponding provision in our State Constitution," citing the following cases:

United States: Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. ed. 485; *Walston v. Nevin*, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. ed. 544; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. 350.

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general rule that a State may, without violating the equal protection clause of the Fourteenth Amendment, put into one class all engaged in business of a special and public character, and require them to perform a duty which they can do better and more quickly than others, and impose a not exorbitant penalty for the nonperformance thereof.⁵²

Massachusetts: Commonwealth v. Railroad Co., 187 Mass. 436, 73 N. E. 530.

Michigan: People v. Smith, 108 Mich. 527, 66 N. W. 382, 32 L. R. A. 853, 62 Am. St. Rep. 715; People v. Bellett, 99 Mich. 151, 57 N. W. 1094, 22 L. R. A. 696, 41 Am. St. Rep. 589.

Missouri: State v. Tower, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402.

New York: People v. Walbridge, 6 Cow. (N. Y.) 512.

North Carolina: Broadfoot v. Fayetteville, 121 N. C. 422, 28 S. E. 515, 39 L. R. A. 245, 61 Am. St. Rep. 668.

Ohio: State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317.

Tennessee: Dugger v. Insurance Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796.

⁵² *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. 28, aff'g 73 S. C. 71. The court, per Mr. Justice Brewer, said: "It is contended that the equal protection of the laws, guaranteed by the first section of the Fourteenth Amendment, is denied. The power of classification is conceded, but this will not uphold one that is purely arbitrary. There must be some substantial foundation and basis therefor. It is asserted that this is merely legislation to compel carriers to pay their debts within a given time, by an unreasonable penalty for any delay, while no one else is so punished, and that there is no excuse for such distinction. (The case involved the constitutionality of a State statute providing for penalty on common carriers for not promptly adjusting damage claims.) We have had before us several cases involving classification statutes, and while the principles upon which classifications may rightfully be made are clear and easily stated, yet the application of those principles to the different cases is often attended with much difficulty. See among others on the general principles of classification: *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. 357; *Bell's Gap Rd. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. 533, and of cases making application of those principles: *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. 255; *Atchison, Topeka & Santa Fe Rd. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. 609, and cases cited in the opinion; *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. 819; *Fidelity Mutual Life Assoc. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. 662; *Farmers' & Merchants' Ins. Co. v. Dobney*, 189 U. S. 301, 23 Sup. Ct. 565, 47 L. ed. 821 (aff'g 62 Neb. 213, 86 N. W. 1070); *Missouri, Kansas & T. Ry. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. 638. We are of the opinion that this case comes within the limits of constitutionality. It is not an act imposing a penalty for the nonpayment of debts." The

§ 14. Same Subject.

There is no unjust discrimination, and no denial of the equal protection of the laws, in regulations regarding railroads, which are applicable to all railroads alike.⁶³ "It is too late in the day to insist that special legislation affecting the rights and liabilities of railroad companies, or other distinct class or kind of corporations, constitutes a denial of the equal protection of the laws simply because the same regulation or restriction is not extended over other corporations or other kinds of business."⁶⁴

court then quotes from *Best v. Seaboard Air Line Rd. Co.*, 72 S. C. 479, 484, and adds: "It is not an act levelled against corporations alone, but includes all common carriers. The classification is based solely upon the nature of the business, that being of a public character. It is true that no penalty is cast upon the shipper, yet there is some guarantee against excessive claims in that * * * there can be no award of a penalty unless there be a recovery of the full amount claimed. Further, the matter to be adjusted is one peculiarly within the knowledge of the carrier."

⁶³ *New York & New England Rd. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 33 L. ed. 269, case aff'd and followed in *New York & New England Rd. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. 976.

⁶⁴ *McGuire v. Chicago, Burlington & Quincy Rd. Co.*, 131 Iowa, 340, 383, 108 N. W. 902, 917.

See the following cases:

United States: *Cincinnati Street Ry. Co. v. Snell*, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. ed. 604; *Tullis v. Lake Erie & Western Rd. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. ed. 192; *St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. ed. 746; *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552; *Magoun v. Illinois Trust & Sav. Bk.*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. 594; *St. Louis & San Francisco Ry. Co. v. Matthews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. ed. 611; *Chicago, Kansas & Western Rd. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. ed. 675; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. 250; *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 209, 8 Sup. Ct. 116, 32 L. ed. 107; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *Kentucky Railroad Tax Cases* (*Cincinnati, New Orleans & Tex. Pac. Rd. Co. v. Kentucky*), 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. 57; *Son Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. 730.

Illinois: *Peoria, Decatur & Evansville Rd. Co. v. Duggan*, 109 Ill. 537, 30 Am. Rep. 619.

Iowa: *Gano v. Minneapolis & St. Louis Rd. Co.*, 114 Iowa, 713, 719, 87 N. W. 714, 55 L. R. A. 263, 89 Am. St. Rep. 393; *Burlington, Cedar Rapids*

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But the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground, something which bears a just and proper relation to the attempted classification and not a mere arbitrary selection.⁵⁵ Again, a State statute putting all non-resident domestic corporations having their places of business and works outside the State, and all foreign corporations coming into the State, on the same footing in respect to service of process, and making the State auditor their attorney in fact to accept process, is a reasonable classification and not unconstitutional as denying equal protection of the laws, because such provision does not apply to all corporations; nor does it deprive such corporations, without due process of law, of their liberty of contract; nor does the requirement that they pay such auditor a small specified annual fee for services amount to a taking of property without due process of law.⁵⁶ Nor does the Fourteenth Amendment deprive the States of the power of classification or require the classification to be logically and scientifically accurate; and sufficiently practical reasons exist for a classification of resident and nonresident property owners in the enforcement of police regulations, provided that the act is impartial as between the classes. So while the enforcement of a

& Northern Ry. Co. v. Dey, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477.

Kansas: Missouri, Kansas & Texas Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653.

Minnesota: Cameron v. Chicago, Milwaukee & St. Paul Ry. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553.

Missouri: Campbell v. Missouri Pacific Ry. Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530.

Ohio: State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317.

⁵⁵ Applied in case of State statute providing as to presentation of certain claims, the institution of certain suits against railway corporations and for recovery of attorney's fees in addition to amount claimed; statute tested by above principles held not sustainable. Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. 255.

⁵⁶ St. Mary's Petroleum Co. v. West Virginia, 203 U. S. 183, 51 L. ed. 144, 27 Sup. Ct. 132.

statute enacted under the police power by criminal proceedings against resident owners, and by civil proceedings against nonresident owners is a discrimination, if, however, it is justified by the circumstances it does not render the statute unconstitutional, nor is it so rendered by the fact that the remedy as to one class may be more efficient than the remedy as to the other.⁵⁷ So a provision in a gas rate statute establishing one rate for the municipality and another for individual consumers is not an unreasonable classification and does not render the act unconstitutional under the equal protection clause of the Fourteenth Amendment. And where none of the different classes of consumers complain of different rates the corporation cannot complain of such differences provided the total receipts are sufficient to yield an adequate return.⁵⁸

§ 15. Police Power—Regulation of Slaughter Houses and Stock Yards.

A State may provide by police regulation for slaughter houses of a corporation by a grant of exclusive right or privilege, guarded by proper limitation as to prices, imposing also the duty of providing ample conveniences with permission to all owners of stock to land, and of all butchers to slaughter at such places.⁵⁹ So the legislature may define public stock yards and regulate them and their charges when not made unreasonable and unjust as denying their owners a reasonable return on their money invested; and such enactment does not constitute a taking of private property without due process of law or just compensation.⁶⁰

But a State statute entitled, "an act defining what shall con-

⁵⁷ *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. 560, rev'g 29 App. D. C. 563, citing *Field v. Barber Asphalt Co.*, 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. 784, and, in *quere* as to police power of *District of Columbia*, considering *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. 527. As to power of Congress to enact discriminatory legislation under the commerce clause see § 45, herein.

⁵⁸ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 392, 53 L. ed. 352.

⁵⁹ *Slaughter House Cases*, 16 Wall. (83 U. S.) 36, 21 L. ed. 394.

⁶⁰ *Ratcliff v. Wichita Union Stock Yards Co.*, 74 Kan. 1, 86 Pac. 150.

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stitute public stock yards, defining the duties of the person or persons operating the same, and regulating all charges thereof, and removing restrictions in the trade of dead animals, and providing penalties for violation of this act," is in violation of the Fourteenth Amendment of the Constitution of the United States, where it applies only to one stock yards company, and not to other companies or corporations engaged in like business in the State and thereby denies to that company the equal protection of the laws.⁶¹

§ 16. Regulation and Control—Insurance Companies.

What has been said elsewhere in regard to the right of a State to prohibit foreign corporations from doing business within its limits, or, in allowing them to do so, to impose such conditions as it pleases, applies to foreign insurance companies.⁶² And as the State has the right to exclude such company, the means by which she causes such exclusion, or the motives of her action, are not the subject of judicial inquiry.⁶³ So the State may make the grant or privilege of doing business therein dependent upon the payment of a specific license tax, or tax on its franchise or business, or a sum proportioned to the amount of its capital used within the State, and except life and foreign insurance companies from its operation;⁶⁴ or it may impose a license tax or fee, or like tax by whatever name it may be called, upon foreign insurance companies for the privilege of doing business in the State.⁶⁵ Returns may also be required of

⁶¹ *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92.

⁶² *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 51 L. ed. 894, 27 Sup. Ct. 578, rev'g 144 Fed. 356; *Swing v. Weston Lumber Co.*, 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. 497, aff'g 140 Mich. 344; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552, 28 Ins. L. J. 97, aff'g 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85, 26 Ins. L. J. 67; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148. See § 18, herein.

⁶³ *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148.

⁶⁴ *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 345, 19 Sup. Ct. 235.

⁶⁵ *Philadelphia Fire Assoc. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. 108; *Home Insurance Co. v. Augusta*, 93 U. S. 116, 23 L. ed. 825; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (77 U. S.) 566, 19 L. ed. 1029,

insurance companies to the proper State officers of their business condition, losses, premiums, taxes, dividends, expenses, etc., which may be enforced against a company even though its special charter does not require such returns;⁶⁶ so a statute may constitutionally prohibit the combination of insurance companies for fixing rates of premium except in cities having a certain population; nor is such an enactment class legislation.⁶⁷

§ 17. Same Subject.

A legislative enactment of a State, which as construed by its highest court, cuts off any defense by a life insurance company based upon false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured, and which applies alike to domestic and foreign corporations is not repugnant to the Fourteenth Amendment, and does not deprive a foreign corporation coming into the State of its liberty or property without due process of law, nor deny to it the equal protection of the laws; and the liberty referred to in the Fourteenth Amendment is the liberty of natural, not of artificial persons.⁶⁸ A State statute may also regulate the measure of damages on fire policies in such terms that it will not as applied to a foreign insurance company insuring property within the State be in conflict with the provisions of the Fourteenth Amendment, forbidding a State to make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law; or to

aff'g *Oliver v. Liverpool & London Life & Fire Ins. Co.*, 100 Mass. 531; *Paul v. Virginia*, 8 Wall. (75 U. S.) 168, 19 L. ed. 357.

• *Eagle Ins. Co. v. Ohio*, 163 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. 868.

• *State, Crow, v. Aetna Ins. Co.*, 150 Mo. 113, 51 S. W. 413, 28 Ins. L. J. 856.

• *Northwestern Life Ins. Co. v. Riggs*, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. ed. 168, aff'g 129 Fed. 207; Rev. Stat. Mo., §§ 7890, 7891.

As to State statute making suicide no defense in actions on life policies, see *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 51 L. ed. 894, 27 Sup. Ct. 578 (rev'g 144 Fed. 356, distinguishing *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139, 154, 42 L. ed. 693, 18 Sup. Ct. 300); *Knights Templars' and Masons' Life Ins. Co. v. Jarman*, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108.

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deny to any person within its jurisdiction, the equal protection of the laws.⁶⁹ An insurance company created and existing under the laws of a State has a constitutional right to enter into a contract in that State for the purpose of insuring property in another State, and the provisions of an insurance law of the latter State are void so far as they interfere with such right.⁷⁰

§ 18. Regulation and Control—Instances—Mines—Hours of Labor—Water Companies—Adulteration—Ship Passenger Laws—Patent Rights.

The use and enjoyment of mining properties may be regu-

⁶⁹ *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552, 28 Ins. L. J. 97, aff'g 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85, 26 Ins. L. J. 67.

As to State statutes providing for damages, etc., see § 30, herein.

⁷⁰ *Hammond v. International Ry. Co.*, 116 N. Y. Supp. 854, a case of an action to recover assessments on a fire policy on property located in New York State, issued by a mutual insurance company created and existing under the laws of Massachusetts and not authorized pursuant to the provisions of the Insurance Law of New York, Laws 1892, pp. 1934, 1941, c. 690, §§ 9, 25 (Consol. Stat. N. Y., 1909, "Insurance Law"), to transact the business of insurance therein. The defense was that the contract sued upon was made in the State of New York and was therefore void under the Insurance Law, Laws 1892, p. 1999, c. 690 (Consol. Stat. N. Y., 1909, "Insurance Law"), § 137, providing that: "All fire insurance policies issued to residents of this State on property located herein by companies that have not complied with the requirements of the general insurance laws of the State shall be void, except such as shall have been procured" by duly licensed agents to procure such insurance. The company had no officers or agents in New York, and the insurance was not procured by a duly licensed agent, but was obtained through letter and by wire, and the policy was mailed in Boston. It was dated in Massachusetts and was executed and payable there; the premium was paid there; the policy was held a Massachusetts contract which took effect when mailed in Boston. The court cites to the point in the text *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832. The court in the principal case also *cites to point that the contract was the policy* and not the preliminary contract to insure, not amounting to the transaction of business in New York. *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127, citing further *to point that policy was a Massachusetts contract which took effect when mailed in Boston*. *Western v. Genesee Mutual Ins. Co.*, 12 N. Y. 258; *Baker v. Spaulding Bros.*, 71 Vt. 169, 42 Atl. 982; *Western Mass.*

lated by the State.⁷¹ So the hours of labor in mines, smelters, and reduction or refining works may be regulated by the police power of a State.⁷² A water company may also be subject to legislative action where there is nothing in the statute under which it is organized or in any contract with a city for supplying water which give it rights excluding such legislation.⁷³ A State has power to prevent the adulteration of articles and to provide for the publication of their composition without depriving the manufacturers thereof of their property or liberty without due process of law or denying them the equal protection of the law.⁷⁴ A State may also enact passenger regulations requiring certain reports from masters of vessels to be made under penalty where such law is not a regulation of commerce but of police, and the operation of the law only begins when that of the laws of Congress end, and is not of the same subject although it operates upon the same person.⁷⁵

F. Ins. Co. v. Hilton, 58 N. Y. Supp. 996, 42 App. Div. 52, and, therefore, that this action would lie.

⁷¹ *Washington Star Mining Co. v. Fulton*, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. 412.

⁷² *Short v. Bullion-Beck & C. Min. Co.*, 20 Utah, 20, 45 L. R. A. 603, 57 Pac. 720. See *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780; *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *State v. Holden (Holden v. Hardy)*, 14 Utah, 71, 96, 46 Pac. 756, 1105, 37 L. R. A. 103, 108. But compare *Eight Hours Bill, In re*, 21 Colo. 29, 39 Pac. 328; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79; *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702; *Wheeling Bridge & T. R. Co. v. Gilmore*, 8 Ohio C. C. 658. See §§ 26, 27, herein, as to employees, etc.

⁷³ *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. 718.

⁷⁴ *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. 114.

⁷⁵ *New York v. Miln*, 11 Pet. (36 U. S.) 102, 9 L. ed. 648. Case criticised and weight due as authority considered in *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543, where the court holds that the case decides no more than that the requirement from the master of a vessel of a catalogue of his passengers landed in the city, rendered to the mayor on oath, with a correct description of their names, ages, occupations, places of birth and last legal settlement, was a police regulation within the power of the State to enact, and not inconsistent with the Constitution of the United States. Examine *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. 671, aff'g 155 Fed. 428.

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So a State may, until Congress legislates, make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens from fraud.⁷⁶

§ 19. Regulation and Control—Foreign Corporations—Rule.⁷⁷

A State has power to regulate and control its own creations, and, *a fortiori*, foreign corporations permitted to do business within its limits;⁷⁸ and it may admit the latter on prescribed conditions, that is, it may impose such conditions upon permitting them to do business within its limits as it may judge expedient or exclude them from its borders.⁷⁹ So the right under the Constitution to pursue a lawful business is not abridged by the imposition by a State of conditions upon the right of a foreign insurance company to transact business within its territorial limits.⁸⁰ A State also has power to impose conditions upon a foreign corporation in permitting it to become one of the constituent elements of a consolidated corporation organized under its laws, and the acceptance of the franchise implies a submission to the conditions without which the franchise could not have been granted.⁸¹

⁷⁶ *Osan Lumber Co. v. Union County Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. 89; following *Woods & Sons v. Carl*, 203 U. S. 358, 51 L. ed. 219, 27 Sup. Ct. 99; *Allen v. Riley*, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. 95.

⁷⁷ See § 16, herein.

⁷⁸ *St. Mary's Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. ed. 144, 27 Sup. Ct. 132; *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552, 28 Ins. L. J. 97, aff'g 136 Mo. 382, 35 L. R. A. 227, 38 S. W. 85, 26 Ins. L. J. 67. See *Joyce on Franchises*, §§ 342, 352-364 *et seq.*

⁷⁹ *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, 51 L. ed. 894, 27 Sup. Ct. 578, rev'g 144 Fed. 356; *Swing v. Weston Lumber Co.*, 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. 497, aff'g 140 Mich. 344; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. ed. 657; *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 345, 19 Sup. Ct. 235; *La Moine Lumber & Trading Co. v. Kesterson (U. S. C. C.)*, 171 Fed. 980. See *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148.

⁸⁰ *Hickman v. State*, 62 N. J. L. 499, 41 Atl. 942, 44 Atl. 1099. See *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 51 L. ed. 894, 27 Sup. Ct. 578, rev'g 144 Fed. 356; *Swing v. Weston Lumber Co.*, 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. 497, aff'g 140 Mich. 344.

⁸¹ *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 17 Sup. Ct. 865.

§ 20. Same Subject—Limitations Upon Rule.

The rule stated under the preceding section is subject to certain limitations as to interstate and foreign commerce; thus, statutes which inhibit foreign corporations from doing business within a State, or which impose restrictions thereon cannot be permitted to impair the power of Congress to regulate commerce among the several States, nor can they operate to restrict the rights of citizens or corporations to engage in commerce between the States;⁸² nor can such conditions be repugnant to the Constitution and laws of the United States, or inconsistent either with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or those principles of natural justice which forbid condemnation without opportunity for defense.⁸³ Again, a foreign corporation lawfully doing business in a State is no more bound by a general unconstitutional enactment than a citizen of that State.⁸⁴

So where a foreign corporation holds a valid mortgage upon property within a State it cannot be precluded by State legislation from foreclosing the same because it has not complied with such laws, as such an enactment violates the Fourteenth Amendment in not affording the equal protection of the laws.⁸⁵

⁸² *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 345, 19 Sup. Ct. 235; *La Moine Lumber & Trading Co. v. Kesterson* (U. S. C. C.), 171 Fed. 980.

⁸³ *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. ed. 188. See *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 51 L. ed. 894, 27 Sup. Ct. 578, rev'g 144 Fed. 356.

⁸⁴ *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. 56.

⁸⁵ *Black v. Caldwell* (U. S. C. C.), 83 Fed. 880.

CHAPTER III

CONSTITUTIONAL BASIS OF ACTIONS AND DEFENSES—REGULATION AND CONTROL, CARRIERS ¹

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| <p>§ 21. Regulation and Control—
Transportation Companies—
Railroads—Street Railroads
—Express Companies.</p> <p>22. Railroads—Obligation of Contract—Due Process of Law.</p> <p>23. Railroads—Obligation of Contract—Exemption and Transfer Thereof—Due Process of Law.</p> <p>24. State Statutes—Railroad Crossings—Viaducts and Bridges—Expense of Change of Grade or Removal—Police Power—Nonjudicial Question.</p> <p>25. State Statutes—Railroad Tunnels, Viaducts and Crossings—Expense of Removal or Repairs—Vested Rights.</p> | <p>§ 26. Federal and State Regulations as to Employers and Employees—Carriers, etc.—Police Power—Interstate Commerce.</p> <p>27. Same Subject.</p> <p>28. Federal Statute to Insure Humane Treatment of Live Stock by Carriers.</p> <p>29. Right of State to Augment or Limit Carrier's Liability.</p> <p>30. State Statutes Providing for Damages—Presentation and Adjustment of Claims—Penalty—Carriers—Railroads.</p> <p>31. Regulation and Control—Telegraph and Telephone Companies—Electrical Subways.</p> |
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§ 21. Regulation and Control—Transportation Companies—Railroads—Street Railroads—Express Companies.

The business of a transportation company operating under a franchise is not purely private, but is so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation.² So a railroad charter is taken and held subject to the power of the State to regulate and control the grant in the interest of the public.³ So rail-

¹ See § 1, herein.

² *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. ed. 186, rev'g 15 *Hawaii*, 553.

³ *Louisville & Nashville Rd. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. 95.

road corporations are subject to such legislative control as may be necessary to protect the public against danger, injustice and oppression.⁴ Such companies may also be regulated as to their State business either by direct State legislation or by administrative bodies endowed with power to that end, as the business of such corporations is of a public nature and the public has an interest in their operation; but the power to regulate cannot be so arbitrarily exercised as to infringe upon the right of ownership in conflict with the due process and equal protection clauses of the Fourteenth Amendment.⁵ So within the power of the State to regulate and control it may require railroad companies to fence their roads.⁶ The power to regulate the operation of railroads also includes regulation of the schedule for running trains⁷ and, as it is the proper duty of a railroad company to establish stations at proper places, it is within the power of the States to make it *prima facie* a duty of such companies to establish them at all villages and boroughs on their respective lines.⁸ So the imposition upon a railroad corporation of the entire expense of a change of grade at a highway crossing does no violation to the Constitution of the United States, if the statute imposing it provides for an ascertainment of the result in a mode suited to the nature of the case,⁹ and requiring the burden of a public service by a corporation, in consequence of its existence and of the exercise of privileges obtained at its request, to be borne by it, is neither denying to it the equal protection of

⁴ *New York & New Eng. Rd. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269.

⁵ *Atlantic Coast Line Rd. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 51 L. ed. 93, 27 Sup. Ct. 585.

⁶ *Minneapolis & St. Louis Ry. Co. v. Emmons*, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. 870.

⁷ *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. ed. 186, *rev'd* 15 Hawaii, 553.

⁸ *Minneapolis & St. Louis Ry. Co. v. Minnesota ex rel.*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. 396.

⁹ *New York & New England Rd. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269, *case aff'd* and followed in *New York & New England Rd. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. 976.

the laws, nor making any unjust discrimination against it. Therefore the provisions of a State statute requiring the salaries and expenses of the State Railroad Commission to be borne by the several corporations owning or operating railroads within the State, are not in conflict with the provision in the Fourteenth Amendment to the Constitution that a State shall not "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹⁰ So the State may regulate consolidation of common carrier corporations;¹¹ and a railroad forming a continuous line in two or more States, and owned and managed by a corporation whose corporate powers are derived from the legislature of each State in which the road is situated, is, as to the domestic traffic in each State, a corporation of that State, subject to State laws not in conflict with the Constitution of the United States.¹² Again, a city has power to make a reasonable regulation concerning the use of the street by a street railroad company by directing the maintenance of but one track between certain points instead of a double track as originally granted to the company.¹³

A State statute which defines an express company to be persons and corporations who carry on the business of transportation on contracts for hire with railroad or steamboat companies does not invidiously discriminate against the express companies defined by it, and in favor of other companies or persons carrying express matter on other conditions, or under different circumstances.¹⁴

¹⁰ *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. 255, 48 Am. & Eng. R. Cas. 595; Gen'l Stat. S. C. 1882, c. 4.

¹¹ *Louisville & Nashville Rd. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. 714.

¹² *Railroad Commission Cases (Stone v. Farmers' Loan & Trust Co.)*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334.

¹³ *Baltimore v. Baltimore Trust & Guar. Co.*, 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. 696. See *Wabash Rd. Co. v. Defiance*, 167 U. S. 88, 98, 17 Sup. Ct. 748, 42 L. ed. 87. Examine *Joyce on Electric Law* (2d ed.), §§ 353 *et seq.*

¹⁴ *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. 250.

§ 22. Railroads—Obligation of Contract—Due Process of Law.

The prohibition in the Federal Constitution against the passage of laws impairing the obligation of contracts applies to the Constitution as well as to the laws of each State.¹⁵ So municipal legislation passed under supposed legislative authority from the State is within the prohibition of the Federal Constitution and void if it impairs the obligation of a contract.¹⁶ But a municipal ordinance giving permission to a street railroad company to construct a tunnel under a navigable stream, the law of the State providing that railways shall not be constructed so as to interrupt the navigation of any water in the State, does not amount to a contract under the contract clause of the Constitution, so that the city could not subsequently require the company to lower the tunnel so as not to interfere with the increased demands of navigation; nor, in the absence of any provision to that effect, would it be construed as containing an implied covenant that the municipality would bear the expense of such alterations required by subsequent ordinances. A municipality is under the duty of protecting the unobstructed navigation of navigable rivers under its jurisdiction; and it cannot be exempted therefrom by making agreements in regard thereto.¹⁷ So a statute which describes a mode of serving process upon railroad companies different from that provided for in a charter previously granted to a particular company, does not impair the obligation of the contract between such company and the State.¹⁸ And a State legislature may make any alteration or amendment of a charter of a public service corporation which will not defeat or substan-

¹⁵ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 615, 6 Sup. Ct. 252.

As to obligation of contract, impairment thereof and exemptions, see *Joyce on Franchises*, §§ 301-340.

¹⁶ *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341.

¹⁷ *West Chicago Street Railroad Co. v. Chicago*, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. 518, *aff'g* 214 Ill. 9, 73 N. E. 393.

¹⁸ *Railroad Co. v. Hecht*, 95 U. S. 168, 24 L. ed. 423.

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tially impair the object of the grant or any rights vested under it where such charter is granted subject to the power reserved by statute to alter, amend or repeal the same.¹⁹ So a general law requiring street railways to keep a certain space between and outside their tracks paved and repaved and assessing them therefor amounts, in respect to companies whose charters contain other provisions, to an amendment thereof, and as such a purpose is consistent with the object of the grant it falls within the reserved power of the State to alter, amend or repeal the original charter, and if imposed in good faith and not in sheer oppression the act is not void either as depriving the company of property without due process of law or as impairing the obligation of the original grant.²⁰

§ 23. Railroads—Obligation of Contract—Exemption and Transfer Thereof—Due Process of Law.²¹

Although the obligations of a legislative contract granting immunity from the exercise of governmental authority are protected by the Federal Constitution from impairment by the State, the contract itself is not property which as such can be transferred by the owner to another, but is personal to him to whom it is made and incapable of assignment, unless by the same or a subsequent law the State authorizes or directs such transfer, and this applies to a contract of exemption with a street railway company from assessments from paving between its tracks. Nor does a legislative authority to transfer the estate, property, rights, privileges and franchises of a corporation to another corporation authorize the transfer of a legislative contract of immunity from assessment. And where a corporation incorporates under a general act which creates

¹⁹ *New York & New England Rd. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. 437.

As to reserved power to alter, amend or repeal charter or franchise see *Joyce on Franchises*, §§ 317 *et seq.*

²⁰ *Fair Haven Rd. Co. v. New Haven*, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. 74, *aff'g* 77 Conn. 677. So held as to Connecticut law of 1899.

²¹ See § 79, herein.

certain obligations and regulations, it cannot receive by transfer from another corporation an exemption which is inconsistent with its own charter or with the Constitution or laws of the State then applicable, even though under legislative authority the exemption is transferred by words which clearly include it. Again, although two corporations may be so united by one of them holding the stock and franchises of the other, that the latter may continue to exist and also to hold an exemption under legislative contract, that is not the case where its stock is exchanged for that of the former and by operation of law it is left without stock, officers, property or franchises, but under such circumstances it is dissolved by operation of the law which brings this condition into existence.²² A provision in the Constitution of a State that a carrier must deliver cars

²² *Rochester Ry. Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 237, 27 Sup. Ct. 74. See *Powers v. Detroit, Grand Haven & M. Ry. Co.*, 201 U. S. 543, 26 Sup. Ct. 556, 50 L. ed. 860, aff'g 138 Fed. 264 (when exemption from taxation not destroyed; reorganization of railroad; obligation of contract); *Metropolitan St. Ry. Co. v. New York State Board Tax Commissioners*, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 23 [(taxation; exemption; equal protection; due process of law; obligation of contract) case followed in *Twenty-Third St. Ry. Co. v. New York State Board Tax Commissioners*, 199 U. S. 53, 50 L. ed. 85, 25 Sup. Ct. 715; which also follows *Brooklyn City Rd. Co. v. New York*, 199 U. S. 48, 50 L. ed. 79, 25 Sup. Ct. 713]; *Savannah, Thunderbolt & Isle of H. Rd. Co. v. Savannah*, 178 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. 79 (contract between street railroad and city; no exemption; obligation of contract not impaired); *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. 107 (when exemption not a contract between State and railroad the obligation of which cannot be impaired); *Stearns v. Minnesota*, 179 U. S. 223, 21 Sup. Ct. 23, 45 L. ed. 162, rev'g 72 Minn. 200, 75 N. W. 210 (exemption; effect of subsequent law repealing); *Wilmington & W. Rd. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. 72 (effect of exemption and rule as to being a contract between State and corporation protected against legislative impairment considered and prior cases examined); *Railroad Companies v. Gaines*, 97 U. S. 697, 24 L. ed. 1091 (no exemption after period specified in charter; grant to A. did not convey exemption to B.); *Tucker v. Ferguson*, 22 Wall. (89 U. S.) 527, 22 L. ed. 805 (exemption must be based upon consideration, otherwise no "contract"; no presumption in favor of contract of exemption and such a claimed contract must be strictly construed); *Pacific Railroad Co. v. Maguire*, 20 Wall. (87 U. S.) 36, 22 L. ed. 282 (exemption; obligation of contract impaired); *Tomlinson v. Jessup*, 15 Wall. (82 U. S.) 454, 21 L. ed. 204 (exemption; power reserved to State authorized change in contract).

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to connecting carriers without providing adequate protection for their return, or compensation for their use, amounts to a taking of property without due process of law within the meaning of the Fourteenth Amendment.²³

²³ *Louisville & Nashville Rd. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 29 Sup. Ct. 146, rev'g 97 S. W. 778.

As to railroads and due process of law see the following cases: *New York Central & Hudson R. Rd. Co. v. Miller*, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. ed. 1155 (taxation of cars under New York franchise tax law; owner not deprived of property without due process of law); *Savannah, Thunderbolt & Isle of H. Rd. Co. v. Savannah*, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. 690 (classification between street railway and steam railroad making extra charge for local deliveries of freight from outside city; tax not void as depriving street railway of property without due process of law); *Minneapolis & St. L. Rd. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. 396 (statutes requiring railroad to erect and maintain stations on order of commission not a taking of property without due process of law); *Detroit, Fort Wayne & Belle Isle Ry. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. 540, aff'g 127 Mich. 219, 86 N. W. 842 (commissioner of railroads has power to compel street railroads to install safety appliances and apportion cost between it and steam railroad on same street); *Wheeler v. New York, New Haven & Hartford Rd. Co.*, 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. 949 (contract with city to pay certain proportion of expense of abolishing grade crossings; defendants whose lands were sought to be condemned, not alleging that they were taxpayers or specially interested not deprived of property without due process of law); *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858, rev'g *Smith v. Lake Shore & Michigan Southern Ry. Co.*, 114 Mich. 460, 72 N. W. 328, 4 Det. L. N. 662, 8 Am. & Eng. R. Cas. (N. S.) 496 (statute as to mileage tickets on railroads a violation of due process of law clause); *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, 30 Chicago Leg. N. 243, 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197 (act to regulate railroads, classify freights, and fix reasonable maximum rates a deprivation of just compensation secured by Constitution); *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. 243 (statute making railroads liable in damages for fire communicated by locomotives held not to deprive company of property without due process of law); *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567 (railroad rates; unreasonable legislative regulation; company deprived of property without due process); *Charlotte, Columbia & Augusta Rd. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. 255, 48 Am. & Eng. R. Cas. 595 (statute requiring railroads to bear expenses of State Railroad Commission not a deprivation of property without due process); *Chicago, Minneapolis & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462 (railroad freight rate act in conflict with due process clause); *Huling v. Kaw Valley R. & I. Co.*, 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. 603 (pub-

§ 24. State Statutes—Railroad Crossings—Viaducts and Bridges—Expense of Change of Grade, or Removal—Police Power—Nonjudicial Question.²⁴

The act of the legislature of a State relating to railway grade crossings, which is directed to the extinction of grade crossings as a means of public safety, is a proper exercise of the police power of the State.²⁵ So in view of the paramount duty of a State legislature to secure the safety of the community at an important railroad crossing within a populous city, it was and is within its power to supervise, control and change agreements from time to time entered into between the city and the railroad company as to a viaduct over such crossing, saving any rights previously vested.²⁶

It is likewise competent for the legislature of the State to put the burdens of the repairs of such a viaduct, crossing several railroads, upon one of the companies, or to apportion it among all, as it sees fit; and an apportionment may be made through the instrumentality of the City Council.²⁷ A State may also impose upon a railroad corporation the entire expense of a change of grade at a highway crossing, if the statute im-

posed notice in proceedings to condemn land for railroad is "due process of law"); *Nashville, Chattanooga & St. Louis Rd. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352 (examination of railroad employes; color blindness; not a taking of property without due process of law); *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841 (maximum fare statute; not a taking of property as applied to reorganized corporation); *Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734 (ordinance prohibiting steam cars of specified railroad in city limits not a taking of company's property without due process of law).

²⁴ See §§ 107 *et seq.*, herein, Railroad Commissioners.

²⁵ *New York and New England Rd. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269, case *aff'd* and followed in *New York & New England Rd. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. 976. Act of June 19, 1889, c. 220, Laws 1889, 134.

²⁶ *Chicago, B. & Q. R. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. ed. 948.

²⁷ That city has power to change grade of streets, crossing on bridges over a railroad, to the level of the railroad, see *Wabash Railroad Co. v. Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. 748.

²⁸ *Chicago, B. & Q. R. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. ed. 946.

posing it provides for an ascertainment of the result in a mode suited to the nature of the case.²⁸

Under the laws of Illinois the draining of bodies of land so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the State may by appropriate agencies exert the general powers it possesses for the common good, and the Farm Drainage Act of that State was a proper exercise of its police power. The rights of a railroad company to a bridge over a natural water course crossing its right of way, acquired under its general corporate power of Illinois are not superior and paramount to the right of the public to use that water course for the purpose of draining lands in its vicinity in accordance with plans adopted by a drainage commission lawfully constituted under such Farm Drainage Act. So where the proper drainage of the land in a certain district was impossible without the removal of a railroad bridge over the natural water course into which the lands drained and the construction of a bridge with a larger opening for the increased volume of water, it was held that it was the duty of the railroad company, at its own expense, to remove the then existing bridge, and also, unless it abandoned or surrendered its right to cross a creek at or in that vicinity, to erect at its own expense and maintain a new bridge in conformity with regulations established by the Drainage Commissioners, under the authority of the State; and such requirement, if enforced, does not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws.²⁹ What is the best method of eliminating a grade crossing in a given case is an administrative question pure and simple which cannot constitutionally be made the subject-matter of judicial determination; and, therefore, a statute which purports to give jurisdiction of such a question to a purely judicial body or

²⁸ *New York & New England Rd. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. 437.

²⁹ *Chicago, Burlington & Quincy Ry. Co. v. Drainage Comm'rs*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596, aff'g 212 Ill. 103, 72 N. E. 219.

court, on appeal from the action of railroad commissioners is, to that extent, null and void.³⁰

§ 25. State Statutes—Railroad Tunnels, Viaducts and Crossings—Expense of Removal or Repairs—Vested Rights.³¹

The right of a railroad company to maintain a tunnel under a navigable river is subject to the paramount public right of navigation, and where it has been constructed under municipal ordinance and State law that it shall not interrupt navigation, the duty of not obstructing the navigation is a continuing one; and if the increased demands of navigation at any time require a deeper channel than when the tunnel was originally constructed, it is within the power of the municipality to compel the railroad company at the latter's own expense to either remove the tunnel or lower it to conform with the necessities of commerce, and, as in this case, to the rule established by act of Congress; and such action of the municipality is not unconstitutional, and does not amount either to taking the property for public use without compensation, or depriving the company of its property without due process of law.³² An ordinance of a municipality, valid under the law of the State as construed by its highest court, compelling a railroad to repair a viaduct constructed after the opening of the railroad, by the city in pursuance of a contract relieving the railroad, for a substantial consideration, from making any repairs thereon for a term of years was not void under the contract, or the due process clause of the Constitution.³³ But the right of a State to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and

³⁰ *Spencer's Appeal*, 78 Conn. 301.

³¹ See §§ 107 *et seq.*, herein, *Railroad Commissioners*.

³² *West Chicago Street Railroad Co. v. Chicago*, 201 U. S. 506, 50 L. ed. 45, 26 Sup. Ct. 578, *aff'g* 214 Ill. 9, 73 N. E. 393. Following *Chicago, Burlington & Quincy Rd. Co. v. Drainage Commission*, 200 U. S. 561, 50 L. ed. 506, 26 Sup. Ct. 341.

³³ *St. Paul, Minneapolis & Manitoba Ry. Co. v. Minnesota*, 214 U. S. 497, 29 Sup. Ct. 698, *aff'g* *Northern Pacific Ry. v. Duluth*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341, as involving almost the same question.

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control and does not authorize interference with property rights vested under the power granted. This applies to a case where a railroad company has, by acquiring a right of way and by constructing its railroad under a statute in force at the time, requiring railroads thereafter crossing to pay all the expense of constructing and maintaining such crossing, acquired a vested property right which cannot be divested without compensation under a reserve power to alter or amend its charter, and it cannot therefore be charged with such expense by a subsequent statute where another railroad thereafter seeks to cross its lines.³⁴

§ 26. Federal and State Regulations as to Employers and Employés—Carriers, etc.—Police Power—Interstate Commerce.

It is within the power of the State to change or modify, in accord with its conceptions of public policy, the principles of the common law in relation to master and servant; and in cases within the proper scope of the police power, to impose upon the master liability for the willful act of his employé.³⁵ The power of Congress to regulate interstate commerce is plenary, and, as an incident to this power, Congress may regulate by legislation the instrumentalities engaged in the business, and may prescribe the number of consecutive hours an employé of a carrier so engaged shall be required to remain on duty; and when it does legislate upon the subject, its act supersedes any and all State legislation on that particular subject.³⁶ So the act of Congress of March 4, 1907, making

³⁴ State ex rel. Northern Pac. Ry. Co. v. Railroad Commission (Wis., 1909), 121 N. W. 919.

³⁵ Wilmington Mining Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. 412.

³⁶ State ex rel. Atkinson v. Northern Pacific Ry. Co., 53 Wash. 873, 876, 102 Pac. 876, 877, "In fact these propositions can hardly be said to be debatable in the State courts, since the Federal courts, whose decisions are authoritative on questions of this character, have repeatedly announced them as governing principles in determining the validity of regulative legislation concerning carriers of interstate commerce. Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442; Morgan Steamship Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. ed. 237;

it unlawful for any common carrier to require employes to remain on duty for a longer period than sixteen consecutive hours, and providing that the act shall "take effect and be in force one year after its passage," did not take effect as a law until the end of such period, and it did not supersede, during such year, a prior State statute on the same subject³⁷ upon any principle of comity, or upon the theory that Congress had occupied the field of statutory regulation and fixed a reasonable time to allow carriers to comply with the regulations.³⁸ But an act addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the nature of the business at the time of an injury, of necessity includes subjects wholly outside of the power of Congress under the commerce clause of the Constitution. By virtue, however, of the constitutional grant of authority to regulate interstate commerce and to use all means appropriate to the exercise of the powers conferred, Congress has power to regulate the relation of master and servant to the extent that such regulations are confined solely to interstate commerce.³⁹ So the Employers' Liability Act of Congress does not constitute either an unreasonable or arbitrary classification although it abolishes the fellow servant rule and restricts or limits its application to carriers by rail.⁴⁰ The Federal Supreme Court

Nashville, Chattanooga & St. Louis Ry. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352; *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. ed. 1064; *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 255, 19 Sup. Ct. 465, 43 L. ed. 702; *Erb v. Morasch*, 177 U. S. 1, 20 Sup. Ct. 519, 44 L. ed. 897," per Fullerton, J.

³⁷ Laws 1907, p. 25.

³⁸ *State ex rel. Atkinson v. Northern Pac. Ry. Co.*, 53 Wash. 673, 102 Pac. 576.

³⁹ *Employers' Liability Cases*, 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. 141. See *Watson v. St. Louis, I. M. & S. Ry. Co.* (U. S. C. C.), 169 Fed. 942, 944-946, 948, 950, 952; *Fulgham v. Midland Valley R. Co.* (U. S. C. C.), 167 Fed. 660, 661; *United States v. Wheeling & L. E. R. Co.* (U. S. C. C.), 167 Fed. 198, 199, 200; *Ivy v. Western Union Teleg. Co.* (U. S. C. C.), 165 Fed. 371, 377; *United States v. Southern Ry. Co.*, 164 Fed. 347, 350.

⁴⁰ *Watson v. St. Louis, I. M. & S. Ry. Co.*, 162 Fed. 942; Act of April 22, 1908, 35 Stat. 65.

did not, however, in its decision of the *Employers' Liability Cases*⁴¹ hold the act of 1906⁴² unconstitutional so far as it related to the District of Columbia and the Territories, and expressly refused to interpret the act as applying only to such employés of carriers in the District and Territories as were engaged in interstate commerce. The evident intent of Congress in enacting said *Employers' Liability Act*, was to enact the curative provisions of the law as applicable to the District of Columbia and the Territories under its plenary power irrespective of the interstate commerce feature of the act, and although unconstitutional as to the latter as held in the above-mentioned case, it is constitutional and paramount as to commerce wholly in the District and Territories. Said enactment of 1906 being, therefore, a constitutional regulation of commerce in the District of Columbia and the Territories necessarily supersedes prior territorial legislation on the same subject, and noncompliance by a plaintiff employé with a provision of a territorial statute cannot be pleaded by the defendant employer as a bar to an action for personal injuries.⁴³

As to classification, unreasonable discrimination, fellow servants and different class of employés, see the following cases:

United States: *Tullis v. Lake Erie & Western Rd. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. ed. 192; *St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. ed. 746; *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. ed. 109; *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. ed. 107; *Kane v. Erie Rd. Co.*, 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 790.

Indiana: *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301.

Maryland: *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74.

Minnesota: *Herrick v. Minneapolis & St. Louis Ry. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771.

Tennessee: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S. W. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682.

Vermont: *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887.

⁴¹ 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. 141.

⁴² Act of June 11, 1906, c. 3073, 34 Stat. 232.

⁴³ *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. —, 30 Sup. Ct. —, aff'g 117 S. W. 426, and approving *Hyde v. Southern Ry. Co.*, 30 App. D. C. —.

A State statute which imposes upon railway companies liability for damages for the negligence of fellow servants regardless of any contract of insurance, or relief entered into between the person injured and the corporation, prior to the injury, by which such liability was limited, is not repugnant to the Constitution.⁴⁴ Nor does a State statute which provides that, "Every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employés, to any person sustaining such damage," deprive a railroad company of its property without due process of law; and does not deny to it the equal protection of the laws; and is not in conflict with the Fourteenth Amendment to the Constitution of the United States in either of these respects.⁴⁵ But the real and substantial relation or connection with the commerce to be regulated which is necessary to the power to regulate interstate commerce, or to prescribe rules by which such commerce must be governed, does not exist between the membership of an employé in a labor organization and the interstate commerce with which he is connected; and an act of Congress making it a criminal offense against the United States for a carrier engaged in interstate commerce, or an agent or officer thereof, to discharge an employé simply because of his membership in a labor organization cannot be sustained as a regulation of interstate commerce and as such within the competency of Congress. Such an enactment concerning interstate carriers is also an invasion of personal liberty, as well as of the right of property guaranteed by the Fifth Amendment to the Federal Constitution, and is therefore unenforceable as repugnant to the declara-

⁴⁴ *McGuire v. Chicago, Burlington & Quincy Rd. Co.*, 131 Iowa, 340, 108 N. W. 902, Code, § 2071.

⁴⁵ *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. ed. 107. Compiled Laws, Kan., 1881, p. 784. See *Tullis v. Lake Erie & Western R. Co.*, 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. 136 (State statute providing for liability for damages for personal injury suffered by its employé in certain cases; negligence of fellow servant; held not to violate Fourteenth Amendment)

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tion of that amendment that no person shall be deprived of liberty or property without due process of law.⁴⁶

§ 27. Same Subject.

A State may provide for the protection of servants and employes of a railroad.⁴⁷ So the object of the Safety Appliance Act was to protect the lives and limbs of railroad employes by rendering it unnecessary for men operating the couplers to go between the ends of the cars, and the words "used in moving interstate traffic" occurring therein are not to be taken in a narrow sense. This enactment, which declares it to be unlawful for any common carrier engaged in interstate commerce to haul or permit to be hauled or used on its line any car used in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, also relates to all kinds of cars running on the rails, including locomotives and steam shovel cars.⁴⁸ A statute may provide for the examination and licensing of locomotive engineers by a board of examiners where such regulation relates to persons within the territorial jurisdiction and is intended to secure the safety of persons and property for the public, and it does not burden or impede interstate commerce, or conflict with the Federal Constitution, or with any express enactments of Congress upon the subject.⁴⁹

A State statute which requires locomotive engineers and other persons, employed by a railroad company in a capacity which calls for ability to distinguish and discriminate between color signals, to be examined in this respect from time to time by a tribunal established for the purpose, and which exacts a

⁴⁶ *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436.

⁴⁷ *St. Louis, I. M. & St. P. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. 419, 64 Ark. 83, 37 L. R. A. 504, 7 Am. & Eng. Corp. Cas. 772, 40 S. W. 705.

⁴⁸ *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. 407, rev'g 207 Pa. St. 98; Safety Appliance Act of March 2, 1893, § 2, as amended April 1, 1896. See *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 16, 21, 49 L. ed. 872, 25 Sup. Ct. 158.

⁴⁹ *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 8 Sup. Ct. 564.

fee from the company for the service of examination, does not deprive the company of its property without due process of law and so far as it affects interstate commerce, is within the competency of the State to enact, until Congress legislates on the subject.⁵⁰ So a State may, in the exercise of its police powers, regulate, by an eight-hour law, the period of employment by corporations of workingmen in mines, smelters and other institutions for the reduction or refining of ores or metals, with an exception in certain cases of emergency, and such enactment does not violate the provisions of the Fourteenth Amendment by abridging the privileges or immunities of its citizens, or by depriving them of their property or by denying them the equal protection of the laws.⁵¹

In the exercise of its powers the State may by statute provide that eight hours shall constitute a day's work for all laborers employed by or on behalf of the State or any of its municipalities, and make it unlawful for anyone thereafter contracting to do any public work to require or permit any laborer to work longer than eight hours per day except under certain specified conditions and require such contractors to pay the current rate of daily wages. And one who after the enactment of such a statute contracts for such public work is not by reason of its provisions deprived of his liberty or his property without due process of law nor denied the equal protection of the laws within the meaning of the Fourteenth Amendment even though it appear that the current rate of wages is based on private work where ten hours constitute a day's work or that the work in excess of eight hours per day is not dangerous to the health of the laborers. *Quære*, whether a similar statute applicable to laborers on purely private work would be constitutional, not decided.⁵² Congress may, within its constitutional powers, enact a law limiting the hours of

⁵⁰ *Nashville, Chattanooga & St. Louis Rd. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352.

⁵¹ *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383. See § 17, herein.

⁵² *Atkins v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148, aff'g *State v. Atkins*, 64 Kan. 174, 67 Pac. 519, 97 Am. St. Rep. 343.

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laborers and mechanics employed by the United States, or contractor, or subcontractor, upon any of the public works of the United States to eight hours a day except in cases of extraordinary emergency, and impose penalties for the violation of such law.⁵³ A State may provide for the payment monthly of employes of corporations and give a lien for wages with preference over other liens, with certain exceptions, and allow a reasonable attorney's fee in case of action brought, and such enactment does not violate a State constitutional provision as to deprivation of property without due process of law nor interfere with liberty of contract.⁵⁴ A State enactment may also provide for the payment of wages of discharged employes then earned at the contract rate, without deductions for prepayment and for the continuance of the wages at such rate until the same are paid, with a time limit, however, unless action is commenced within the time, and such a statute does not deprive a railroad company of the equal protection of the laws.⁵⁵ So a State enactment requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employes, does not conflict with any Federal constitutional provisions relating to contracts.⁵⁶

§ 28. Federal Statute to Insure Humane Treatment of Live Stock by Carriers.

An act of Congress to insure the humane treatment of animals while in transportation by carriers by limiting their period of confinement in transit without unloading for rest,

⁵³ *Ellis v. United States* (*Eastern Dredging Co. v. United States; Bay State Dredging Co. v. United States*), 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. 600.

⁵⁴ *Skinner v. Garnett Gold Min. Co.*, 96 Fed. 735, Cal. Stat. 1897, p. 231, §§ 1, 2.

⁵⁵ *St. Louis, I. M. & St. P. R. Co. v. Paul*, 64 Ark. 83, 37 L. R. A. 504, 7 Am. & Eng. Corp. Cas. 772, 40 S. W. 705, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. 419.

⁵⁶ *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. 5 (S. C., 78 Iowa, 746), followed in *Dayton Coal & Iron Co. v. Barton*, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. 5.

water and feed, and the other purpose of which is to subserve the interests of the owner or shipper as far as possible in consonance with such treatment by permitting an extension of the time so limited upon written request of the owner or person in custody of the shipment does not constitute a delegation of legislative power or authority to the owner of the stock shipped; nor does such legislation deal with a classification and is, therefore, not unconstitutional.⁵⁷

§ 29. Right of State to Augment or Limit Carriers' Liability.

In the absence of action by Congress a State may by statute determine, and either augment or lessen a carrier's liability, and such a statute limiting the right of recovery of certain classes of persons does not deprive a person injured thereafter of a vested right of property. And although a citizen has a right to travel from one State to another, in the absence of congressional action he does not possess as an incident of such travel the right to exert in a State in which he may be injured a right of recovery not given by the laws thereof, although that right may be given by the laws of other States including the one in which suit is brought. A classification with a railroad company's employes of all persons, including railway postal clerks, not passengers, but so employed in and about the railroad as to be subject to greater peril than passengers, is not so arbitrary as to deprive the railway postal clerk of the equal protection of the laws within the meaning of the Fourteenth Amendment. So a State statute providing that any person, not a passenger, employed in or about a railroad but not an employé, shall in case of injury or loss of life have only the same right of recovery as though he were an employé, is not void, either because contrary to the power delegated to Congress to establish post offices and post roads; or because repugnant to the commerce clause of the Constitution; or in conflict with the due process or equal protection clauses of the

⁵⁷ *United States v. Oregon R. & Nav. Co.* (U. S. C. C.), 163 Fed. 640; Act of Congress, June 29, 1906, c. 3594, 34 Stat. 607; U. S. Comp. Stat. Supp. 1907, p. 918.

Fourteenth Amendment; or because it abridges the privileges and immunities of citizens of the United States; and whether a railway postal clerk is a passenger or whether his right of recovery is limited by such statute is not a Federal question.⁵⁸ It is also held that while Congress under its power may provide for contracts for interstate commerce permitting the carrier to limit its liability to a stipulated valuation, it does not appear that Congress has, up to the present time, sanctioned contracts of this nature; and, in the absence of congressional legislation on the subject, a State may require common carriers, although in the execution of interstate business, to be liable for the whole loss resulting from their own negligence, a contract to the contrary notwithstanding. There is no difference in the application of a principle based on the manner in which a State requires a degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in its courts.⁵⁹

§ 30. State Statutes Providing for Damages—Presentation and Adjustment of Claims—Penalty—Carriers—Railroads.

Where Congress has power to make acts illegal it can authorize a recovery for damage caused by those acts although suffered wholly within the boundaries of one State.⁶⁰ A State may provide that railroad companies owning or operating a railroad in the State shall be responsible in damages to the owner of any property injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad; and that it shall have an insurable interest in the property upon the route of the railroad and may procure insurance thereon in its own name, and such a statute does not deprive such company of its property without due process of

⁵⁸ *Martin v. Pittsburg & Lake Erie Rd. Co.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. ed. 184, aff'g 72 Ohio St. 659.

⁵⁹ *Pennsylvania R. R. Co. v. Hughes* (1903), 191 U. S. 477, 24 Sup. Ct. 132, 48 L. ed. 268, aff'g 202 Pa. 222, 51 Atl. 990.

⁶⁰ *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. ed. 241.

law, or deny to it the equal protection of the laws, or impair the obligation of the contract made between the State and the company by its incorporation under general laws imposing no such liability.⁶¹ A State may also provide for the recovery of damages for the killing of live stock.⁶² If a State statute provides for the presentation of certain claims, the institution of certain suits against railroad companies and for the recovery of a specified sum for attorney's fees in addition to the amount recovered, it cannot be sustained where it operates to deprive such companies of property without due process of law, and denies to them the equal protection of the law in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorneys' fees to the parties successfully suing them, while it gives to them no like or corresponding benefit.⁶³ A State may impose a penalty on all common

⁶¹ *St. Louis & S. F. Ry. Co. v. Matthews*, 165 U. S. 1, 123, 41 L. ed. 611, 17 Sup. Ct. 243.

⁶² *Minneapolis & St. Louis Rd. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. 207.

As to State statute providing for measure of damages on fire insurance policies, see *Orient Insurance Co. v. Daggs*, 172 U. S. 557, noted under § 16, herein.

⁶³ *Gulf, Colorado & Santa Fé Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666; Texas Act of April 5, 1889, providing that: "Any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided such claims for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed \$50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in such case, not to exceed \$10, to be assessed and awarded by the court or jury trying the issue."

When State statute allowing reasonable attorney's fees in actions for

carriers for failure to adjust damage claims within a certain and specified number of days, and such an enactment is not as to intrastate shipments unconstitutional as violative of the Fourteenth Amendment, neither the classification, the amount of the penalty or the time of adjustment being beyond the power of the State to determine; and this applies to small claims, as small shipments are the ones which especially need the protection of penal statutes of this nature.⁶⁴

§ 31. Regulation and Control—Telegraph and Telephone Companies—Electrical Subways.

A State may provide for regulation of carriers of electricity and of electrical conductors.⁶⁵ So the legislature may make lawful the occupation of streets for telegraph, telephone, street railway and other electrical purposes.⁶⁶ The State may also, within the reservation that it does not encroach upon the free exercise of the powers vested in Congress, make all necessary provisions in respect of the buildings, poles and wires of tele-

damages against railroad companies is constitutional, see *Atchison, Topeka & Santa Fé Rd. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. ed. 909.

⁶⁴ *Seaboard Air Line Ry. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. 28, aff'g 73 S. C. 71. The penalty imposed by statute in this case was fifty dollars, and the time limit for adjusting claims was forty days. The court, per Mr. Justice Brewer, says: "The difference between the value of the goods shipped and the freight charges \$1.75, and the amount of the penalty, \$50, naturally excites attention. * * * While in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. If a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute, and yet justice requires that his claim be adjusted and paid with reasonable promptness. Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go—even in cases where classification is legitimate—but we are not prepared to hold that the amount of penalty imposed is so great or the length of time within which the adjustment and payment are to be made is so short that the act imposing the penalty and fixing the time is beyond the power of the State."

⁶⁵ *New York v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. ed. 666.

⁶⁶ *Joyce on Electric Law* (2d ed.), § 143.

graph companies within its jurisdiction which the comfort and convenience of the community may require.⁶⁷ So property of a telephone company, being property devoted to a public use, is a legitimate subject of legislative regulation and control.⁶⁸ So the Constitution and laws of a State may authorize a city to impose upon a telegraph company putting its poles in the streets of such city a charge in the nature of rental for the exclusive use of the parts so used.⁶⁹ A State tax may also be enforced against a telegraph company organized under the law of another State and engaged in interstate commerce in the State of the enactment of the statute, when graduated according to the amount and value of the company's property measured by miles, and it is in lieu of taxes directly levied on the property, and the exercise of such power does not amount to a regulation of interstate commerce, or put an unconstitutional restraint thereon.⁷⁰

Where telegraph companies, engaged in interstate commerce, carry on their business so as to justify police supervision, the municipality is not obliged to furnish such supervision for nothing, but it may, in addition to ordinary property taxation, subject the corporations to reasonable charges, for the expense thereof. The reasonableness of such charges will depend upon all the circumstances involved in the particular case; if in a case tried before a jury the evidence in regard thereto is not such as to exclude every conclusion except one, the question of reasonableness should be submitted to the jury.⁷¹

⁶⁷ *Western Union Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 7 Sup. Ct. 1126.

As to Post Roads Act and hostile legislation, see *Joyce on Electric Law* (2d ed.), §§ 65-67.

⁶⁸ *Joyce on Electric Law* (2d ed.), § 143a.

⁶⁹ *St. Louis v. Western Union Teleg. Co.*, 149 U. S. 465, 13 Sup. Ct. 990, 7 L. ed. 810. See *Joyce on Electric Law* (2d ed.), §§ 106, 911-940b.

⁷⁰ *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 360, 39 L. ed. 311; *Miss. Code* 1880, c. 10, § 585, *Sess. Laws* 1888, c. 3. See *Joyce on Electric Law* (2d ed.), §§ 97-113a, 911-940b.

⁷¹ *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. 817, citing *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489, 492, 30 L. ed. 694, 7 Sup. Ct. 592. See *Joyce on Electric Law* (2d ed.), §§ 99-101b.

The transmission and delivery of telegrams with due diligence may also be required by the State, under penalty for non-compliance, where the messages are from some point without the State to some point within it.⁷² But the State cannot impose any impediment to interstate commerce by attempting to regulate the delivery in other States of messages received within the State; nor does the reserved police power of the State extend to the regulation of the delivery at points without the State of telegraph messages received within the State.⁷³ Again, a State may require electrical companies operating or intending to operate within the State to file with the board of commissioners of electrical subways, maps and plans before constructing their conduits, and assess the expenses and salaries of such board upon the several companies operating electrical conductors.⁷⁴

⁷² *Western Union Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. 934. See *Joyce on Electric Law* (2d ed.), §§ 114-128.

⁷³ *Western Union Teleg. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. ed. 1187. See *Joyce on Electric Law* (2d ed.), §§ 114-128.

⁷⁴ *New York v. Squire*, 145 U. S. 175, 38 L. ed. 666, 12 Sup. Ct. 880. See *Joyce on Electric Law* (2d ed.), §§ 420-437a.

CHAPTER IV

CONSTITUTIONAL BASIS OF ACTIONS AND DEFENSES—RATE REGULATION ¹

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| <p>§ 32. Rate Regulation — Common Carriers — Railroads — Express Companies — Police Power—Interstate Commerce.</p> <p>33. Rate Regulation — Constitutional Limitations—Ferries—Bridges.</p> <p>34. Limitation as to Reasonableness of Rates.</p> <p>35. Same Subject — Terminal Charges by Carrier—Proceedings Against Connecting Carrier — Discrimination — Joint Through Rate.</p> <p>36. Elements in Fixing Rates—</p> | <p>Franchises an Element—"Good Will"—Gas Rates.</p> <p>§ 37. Water Rates—Right to Bargain Away Power to Regulate.</p> <p>38. Regulation of Gas Companies' Rates.</p> <p>39. Rate Regulation—Exemption and Transfer Thereof—Obligation of Contract—Consolidated Companies—Combinations as to Rates.</p> <p>40. Rate Regulation—Long and Short Hauls — Interstate Commerce.</p> <p>41. Same Subject.</p> |
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§ 32. Rate Regulation—Common Carriers—Railroads—Express Companies—Police Power—Interstate Commerce.

Rate-making is a legislative function whether exercised by the legislature or by a subordinate or administrative body to which power has been delegated, such as a municipality. The completed act derives its authority from the legislature and must be regarded as the exercise of a legislative power.² So common carriers cannot unreasonably or unduly discriminate, and are subject to reasonable and just regulation as to rates and to prevent discrimination.³ It was early decided that

¹ See § 1, herein.

² *Knoxville, City of, v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371, citing *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. ed. 1086; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

³ *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 141 Fed. 1003; *Southern Express Co. v. R. M. Rose Co.*, 124 Ga. 581, 53 S. E. 185. See *Penn Refining Co. v. Western New York & Penn. Rd. Co.*,

relief from onerous and burdensome rates of transportation imposed under State authority must be sought in the competition of different lines, and, perhaps, in the power of Congress to establish post roads and facilitate military and commercial intercourse between the different parts of the country.⁴ And until Congress acts it remains with the States, through which a railroad, incorporated by act of Congress, passes, to fix rates for transportation beginning and ending within their respective limits.⁵ Where a statute grants to a railroad company the right "from time to time to fix, regulate and receive, the tolls and charges by them to be received for transportation," it does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated.⁶ So a State statute providing that a railroad corporation shall fix its rates annually for the transportation of passengers and freight, post the same in all its stations and depots, and that a failure to fulfill the conditions, or the charging of a higher rate, should subject the offending company to certain penalties, is, in the case of railroads running through several States, including that where the State enactment above mentioned had been made, but a police law, and therefore constitutional.⁷ But a statute which makes it unlawful for a railroad company in the State to charge and collect a greater sum for transporting freight than is specified in the bill of lading, is, when applied to freight transported into the State from a place without it in conflict with that provision of the Interstate Commerce Act which makes it unlawful for such carrier to charge and collect a greater or less compensation for the transportation of the property than is 208 U. S. 208, 28 Sup. Ct. 268, 52 L. ed. 456, aff'g 137 Fed. 343, 70 C. C. A. 23; *Joyce on Franchises*, §§ 404-416; *Joyce on Electric Law* (2d ed.), §§ 518-527b.

⁴ *Railroad Co. v. Maryland*, 21 Wall. (88 U. S.) 456, 22 L. ed. 678.

⁵ *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, 30 Chicago Leg. News, 243, 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197.

⁶ *Railroad Commission Cases* (*Stone v. Farmers' Loan & Trust Co.*), 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334.

⁷ *Railroad Co. v. Fuller*, 17 Wall. (84 U. S.) 560, 21 L. ed. 710.

specified in the published schedule of rates provided for in the act, and in force at the time, and being thus in conflict, it is not applicable to interstate shipments.⁸ The power of Congress over interstate transportation embraces all manner of carriage whether gratuitous or otherwise; and in the absence of express exceptions, the intention of Congress in enacting the Elkins Act was to prevent any departure whatever from published rates. Whether or not the issuing of express franks to officers and employés of express companies and their families is prohibited by the Interstate Commerce Act⁹ an injunction is authorized by the Elkins Act¹⁰ wherever a common carrier is engaged in the carriage of passengers or freight at less than the published rate, and by the Hepburn Act¹¹ express companies are brought within the act and obliged to file and publish their rates. The exceptions contained in the Hepburn Act,¹² allowing a common carrier to issue passes for free transportation of passengers to certain classes of persons cannot be extended to give express companies the right to issue passes to the same classes of persons for transportation of merchandise. The purpose of the Elkins Act is to require publication of tariff and to prevent and prohibit all discrimination, and the issuance of express franks falls within such prohibition.¹³

The right of a State to reasonably limit the amount of charges by a railroad company for the transportation of persons and property, within its jurisdiction, cannot be granted away by its legislature unless by words of positive grant, or words equivalent in law.¹⁴

⁸ *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98, 30 L. ed. 910, 15 Sup. Ct. 802.

⁹ Act of February 4, 1889, c. 104, § 2, 24 Stat. 379.

¹⁰ Act of February 19, 1903, c. 708, § 3, 32 Stat. 846, U. S. Comp. Stat. Supp. 1907, p. 880.

¹¹ June 29, 1906, c. 3591, 34 Stat. 584, U. S. Comp. Stat. Supp. 1907, pp. 892, 898.

¹² Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584, U. S. Comp. Stat. Supp. 1907, pp. 892, 898.

¹³ *American Express Co. v. United States*, 212 U. S. 522, 29 Sup. Ct. 315, 33 L. ed. 635.

¹⁴ *Railroad Commission Cases (Stone v. Farmers' Loan & Trust Co.)*, 116

§ 33. Rate Regulation—Constitutional Limitations—Ferries—Bridges.

It is well settled that, within certain limitations, public service corporations are subject to the legislative right to fix rates;¹⁵ and the limitation by legislative enactment of the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle of law, but only gives effect to an old one.¹⁶ The power, however, of the State to prescribe rates and charges or to prevent unjust discrimination and unreasonable rates and charges is governed by the limitation that it cannot be exercised to deprive owners of their property without due process of law or without compensation, nor can they be denied the equal protection of the law.¹⁷

The several States have also the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one State, or between two adjoining States, subject to the paramount authority of Congress over interstate commerce.¹⁸

§ 34. Limitation as to Reasonableness of Rates.

Rates when fixed by legislative authority, for public service corporations, should allow a fair return upon the reasonable value of the property at the time of being used; they should not be confiscatory; and whether a rate yields such a fair return as not to be confiscatory, depends upon circumstances, locality and risk, and no particular rate can be established for, and no particular rule given which will be applicable to all classes. The rule seems to be well settled, however, that the

U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334. See also *Louisville & Nashville Rd. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. 95.

¹⁵ *Willeox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 392, rev'g 157 Fed. 849. See *Joyce on Franchises*, §§ 298, 299, 390-416; *Joyce on Electric Law* (2d ed.), §§ 518-527b.

¹⁶ *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

¹⁷ *Western Union Teleg. Co. v. Myatt*, 98 Fed. 335.

¹⁸ *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 36 L. ed. 962.

legislative act will not be held invalid unless the rates are plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public.¹⁹ It is also settled that a State cannot so regulate rates for the transportation of persons and property as will not admit of the carrier earning such compensation as under all the circumstances is just to it and the public and thereby deprive such carrier of property without due process of law and deny to it the equal protection contrary to the Fourteenth Amendment.²⁰ It is also determined that the grant to the legislature of a State in its Constitution, of the power to establish maximum rates for the transportation of passengers and freight on railroads in such State will be held to have reference to reasonable maximum rates, as the words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness, and it cannot be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, and that the judiciary may not, when its jurisdiction is properly invoked, protect those rights.²¹ But while the enforcement by a State of a general scheme of maximum rates so unreasonably low as to be unjust and unreasonable may be confiscatory and amount to taking property without due process of law, the State has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public even though it may entail

¹⁹ *Willeox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 392, rev'g 157 Fed. 849, citing *San Diego Land & Town Co. v. Jasper*, 199 U. S. 439, 442, 47 L. ed. 892, 23 Sup. Ct. 892; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 767, 43 L. ed. 1154, 14 Sup. Ct. 804.

Reasonableness of rates, see *Southern Pac. Co. v. Bartine* (U. S. C. C.), 170 Fed. 725.

²⁰ *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, 30 Chicago L. News, 243, 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197. See also *Missouri, Kansas & Texas Ry. Co. v. Interstate Commerce Commission* (U. S. C. C.), 164 Fed. 645.

²¹ *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, 30 Chicago L. News, 243, 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197.

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some pecuniary loss, for a distinction exists between the two cases.²² It is held, however, as to wharfage that it is, in the absence of Federal legislation, governed by local State laws, and if the rates authorized by them and by municipal ordinances enacted under their authority are unreasonable, the remedy must be sought by invoking the laws of the State.²³

§ 35. Same Subject—Terminal Charges by Carrier—Proceedings Against Connecting Carrier—Discrimination—Joint Through Rate.

A carrier may charge and receive compensation for services that it may render, or procure to be rendered, off its own line, or outside the mere transportation thereover. Where the terminal charge is reasonable it cannot be condemned, or the carrier charging it required to change it because prior charges of connecting carriers make the total rate unreasonable, and in determining whether the charge of a terminal company is or is not reasonable the fact that connecting carriers own the stock of the terminal company is immaterial, nor does that fact make the lines of the terminal company part of the lines or property of such connecting carriers. Again, the inquiry authorized under the Hepburn Act ²⁴ relates to all charges

²² *Atlantic Coast Line Rd. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585, distinguishing *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, 30 Chicago Leg. News, 243, and citing as illustrating the distinction, *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. 900; *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567. This last case examines in detail the following decisions: *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047; *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 30 L. ed. 176, 12 Sup. Ct. 400; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462; *Dow v. Beidelman*, 125 U. S. 681, 31 L. ed. 841, 8 Sup. Ct. 1028. The principal case (*Atlantic Coast Line Co., etc.*) is cited in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 392, in discussion of the point therein decided as to illegal discrimination in a gas rate act between the city and the consumers individually, the sufficiency of the return of profits and the constitutionality of the statute.

²³ *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 30 L. ed. 976, 7 Sup. Ct. 907.

²⁴ Hepburn Act of June 29, 1906, § 15, c. 3591, 34 Stat. 584.

made by the carrier, and on such an inquiry the carrier is entitled to have a finding that a particular charge is unreasonable before he is required to change it. If the charge of a terminal carrier is itself reasonable the wrong of a shipper by excessive aggregate charges should be corrected by proceedings against the connecting carrier guilty of the wrong. But the convenience of the commission or the court is not the measure of justice and will not justify striking down a terminal charge when the real overcharge is the fault of a prior carrier.²⁵ It is the duty of a connecting carrier on a joint through rate to accept the cars delivered to it by the initial carrier, and it is not thereby rendered liable for any wrongful discrimination of the initial carrier merely because of the adoption of a joint through rate, which in itself is reasonable; nor is such connecting carrier rendered liable for any such wrongful act of the initial carrier by § 8 of the Interstate Commerce Act.²⁶

²⁵ *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 30 Sup. Ct. —, 54 L. ed. —. In this case it appeared that: On December 10, 1907, the Interstate Commerce Commission entered an order requiring certain railroads running into Chicago to cease and desist from making a terminal charge of two dollars per car for the transportation of live stock beyond the tracks of said railroads in Chicago, and for delivery thereof at the Union Stock Yards, and requiring them to establish and put in force for said services a charge of one dollar per car; compliance with this order was postponed by the Commission until May 15, 1908. On May 7, 1908, the appellees filed this bill in the Circuit Court of the United States for the District of Minnesota, to restrain the enforcement of said order, averring that the actual cost to them for such terminal services exceeded in each instance the sum of two dollars per car, and that the companies were making delivery at a charge less than such actual cost; that, therefore, the reduction of the charge by the commission to one dollar per car was unreasonable, oppressive and unlawful. A hearing was had before three judges of the Eighth Circuit and a restraining order entered as prayed for by the railroad companies, from which order an appeal was taken to the Supreme Court and the order was affirmed. The controversy as to this terminal charge was of long duration. A history of it antecedent to this case will be found in *Interstate Commerce Commission v. Chicago, Burlington & Quincy Rd. Co.*, 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. 824. Examine *Southern Pacific Co. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330, rev'g *Interstate Commerce Commission v. Southern Pac. Ry.*, 132 Fed. 829, considered elsewhere, herein.

²⁶ *Penn Refining Co. v. Western New York & Penn. Rd. Co.*, 208 U. S. 208, 28 Sup. Ct. 268, 52 L. ed. 456, aff'g 137 Fed. 343, 70 C. C. A. 23.

**§ 36. Elements in Fixing Rates—Franchise an Element—
“Good Will”—Gas Rates.**

As stated under a preceding section,²⁷ a fair return should be allowed upon the reasonable value of the property, based upon the particular circumstances of each case, the locality and risk. The value of the property is an essential element in determining whether or not a rate is confiscatory and this is largely a matter of opinion as to real estate and a plant, also as to personal estate when not based upon the actual cost of material and construction; and the same, as to matter of opinion, is to some extent true concerning deterioration of value of a plant.²⁸ So whether a railroad rate is confiscatory so as to deprive the company of its property without due process of law within the meaning of the Fourteenth Amendment depends upon the valuation of the property, the income derivable from the rate, and the proportion between the two, which are matters of fact which the company cannot be prevented from trying before a competent tribunal of its own choosing.²⁹ Again, where a public service corporation raises more money in a particular year than required for actual depreciation it cannot carry the excess to capital for the purpose of estimating the amount on which it is entitled to pay dividends in determining whether a rate is unconstitutional as confiscatory, and the onus of showing that this has not been done is on complainant where the books show that such an excess has been collected. While in some businesses where

²⁷ See § 34, herein.

²⁸ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 392, rev'g 157 Fed. 840. See *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; *Stanislaus County v. San Joaquin & King's River Canal & Irrig. Co.*, 192 U. S. 201, 213, 48 L. ed. 406, 24 Sup. Ct. 241, rev'g 113 Fed. 930; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92, 82 Fed. 839; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 19 Sup. Ct. 804; *Smyth v. Ames*, 169 U. S. 466, 546, 18 Sup. Ct. 418, 42 L. ed. 819, 30 *Chicago Leg. News*, 243, 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197; *Southern Pac. Co. v. Bartine* (U. S. C. C.), 170 Fed. 725.

²⁹ *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

increased demand does not involve a corresponding increase in expense, increased profits may result from decreased rates, this rule does not apply to a business, such as that of a telephone company, where expenses are proportionately increased with increased demand and service.³⁰ Again, to be just and reasonable, within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must be necessarily such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public. And where the cost to the carrier is not kept within reasonable limits, or, where for any reason its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier, the same as it would be in any other line of business.³¹ Another important rule has been laid down as follows, in a case as to gas rates: For the purpose of fixing rates the value of the property employed should be determined as of the time when the inquiry is made, and as a general rule the corporation is entitled to the benefit of increased value since acquisition; and the same case holds that a provision in a State statute, requiring a public service corporation to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained at the rate fixed, deprives the company of its ability to secure such return and is unconstitutional and void. But the court excluded "good will" as an element of value of the property employed where a public service corporation has a monopoly, such as of supplying gas in a large city. The court also concurred with the opinion below that under all the circumstances of the case, six per cent was a

³⁰ *Louisiana Railroad Commission v. Cumberland Teleg. Co.*, 212 U. S. 414, 53 L. ed. 577, 29 Sup. Ct. 357, rev'g 156 Fed. 823. But *quære* and not decided whether it would be entitled to dividends on the excess above mentioned if invested in extensions and additions.

³¹ *Missouri, Kansas & Texas Ry. Co. v. Interstate Commerce Commission* (U. S. C. C.), 134 Fed. 645.

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fair return on the value of the property employed, and that a rate yielding that return was not confiscatory. It was further held that franchises of a public service corporation are property which cannot be taken or used by others without compensation; and, therefore, where a State has by legislative enactment permitted such corporations to capitalize such franchises, their value at the time of such capitalization should be included in the value of the property as an element for fixing rates, but no increased value of such franchises should be allowed; also, that in estimating the value of franchises, for the purpose of fixing rates, it is immaterial that the corporation is taxed on a greater value than that allowed if it charges its taxes as operating expenses in determining net income. The action, however, having been brought before the rate took effect and complainant having failed to sustain the burden of clearly showing that the rate act was confiscatory, the bill for injunction was dismissed without prejudice to complainant's right to bring another action when the rate should go into effect if it then proved to be confiscatory.³²

§ 37. Water Rates—Right to Bargain Away Power to Regulate.

Water rates may be regulated.³³ And the power to regulate water rates is a governmental power continuing in its nature which, if it can be bargained away at all, can only be by words of positive grant, and if any reasonable doubt exists in regard

³² *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 392, rev'g 157 Fed. 849, citing upon the point that franchises are property, etc., *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. 622; *People v. O'Brien*, 111 N. Y. 1, 19 N. Y. St. Rep. 173, 18 N. E. 692. Six per cent was also fixed as a fair return in *Stanislaus County v. San Joaquin & King's River Canal & Irrig. Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241, rev'g 113 Fed. 930.

³³ *Tampa Water Works Co. v. Tampa*, 199 U. S. 241, 50 L. ed. 178, 26 Sup. Ct. 55; *Stanislaus Co. v. San Joaquin & King's River Canal & Irrigation Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241; *Owensboro v. Owensboro Water Works Co.*, 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. 82; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804. See *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371.

thereto it must be resolved in favor of the existence of the power. Thus, to illustrate, an ordinance of a city of Kentucky before it became a city of the third class, giving a water company a right to make and enforce, as part of the conditions upon which it would supply consumers, all needful rules and regulations not inconsistent with the law must be construed as to the law, as it might be altered, and when the city became a city of the third class and thus had power under the general law to provide the city with water by contract or by works of its own and to make regulations for the management thereof and to fix prices to consumers, an ordinance subsequently enacted during the life of the franchise, fixing the price of water, is not void as against the water company under the impairment of contract clause of the Federal Constitution, and in the absence of other grounds the Circuit Court of the United States has no jurisdiction of a suit in equity to restrain the enforcement of such enacted ordinance, no question of unreasonableness of rates being involved.³⁴ But, on the other hand, although a city may have power to regulate water rates, yet the power to reduce them may be so affected by contract with a corporation as to preclude additional burdens being subsequently imposed as a condition to the exercise of a corporate franchise to supply water.³⁵

§ 38. Regulation of Gas Companies' Rates.

Gas companies are also subject to the legislative power to fix rates.³⁶ In a comparatively recent Federal case a peculiar question arose as follows:

A gas company brought an action against a city in Illinois to restrain the enforcement of an ordinance fixing the price of gas, on the ground that the low price practically amounted to taking property without compensation and that the ordi-

³⁴ *Owensboro v. Owensboro Water Works Co.*, 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. 82.

³⁵ *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886.

³⁶ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 392, rev'g 157 Fed. 849.

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nance impaired contract rights. The case was tried on these questions, but they were ignored by the court which decided adversely to the company, although the master had reported that the rates were confiscatory, on the single ground that the company had for a period violated the anti-trust law of Illinois and thereby was not entitled to relief. It was held that although parties making an agreement by the anti-trust act of Illinois might while the agreement was in force be subject to its penalties and whenever they ceased to act under the agreement the penalties also ceased. As the case had been tried on one theory and decided on another and injustice had probably resulted the judgment was reversed and the case sent back so that the terms and duration of the illegal agreement might be ascertained and taken into consideration in determining the case.³⁷

§ 39. Rate Regulation—Exemption and Transfer Thereof—Obligation of Contract—Consolidated Companies—Combinations as to Rates.

Where a contract claimed to have been impaired was made with one of several corporations merged into the complainant, and concededly affected only the property and franchises originally belonging to such constituent company, it was determined that divisional relief could not be granted affecting only such property, when the bill was not framed in that aspect but prayed for a suspension of the impairing ordinance as to all of complainant's property. It was also held that the rule that a special statutory exemption does not pass to a new corporation succeeding others by consolidation or purchase in the absence of express direction to that effect in the statute, was applicable where the constituent companies are held and operated by one of them, under authority of the legislature. It was further decided that even if an asserted exemption from change of rates existed and had not been lost by consolidation, the bill could not be sustained where no such contract rights

³⁷ *Peoria Gas & Electric Co. v. Peoria*, 200 U. S. 48, 50 L. ed. 365, 26 Sup. Ct. 214.

as alleged had been impaired or destroyed by the ordinance.³⁸ Again, a State statute prohibiting combinations of insurance companies as to rates, commissions, and manner of transacting business is not unconstitutional as depriving the companies of their property or of their liberty of contract within the meaning of the Fourteenth Amendment, and the auditor of the State will not be enjoined from enforcing the provisions of the statute. A company lawfully doing business in the State is no more bound by a general unconstitutional enactment than a citizen of that State.³⁹

§ 40. Rate Regulation—Long and Short Hauls—Interstate Commerce.

A State statute which enacts that if any railroad company shall, within the State, charge or receive for transporting passengers or freight of the same class, the same or a greater sum for any distance than it does for a longer distance, it shall be liable to a penalty for unjust discrimination, includes, by construction, a transportation of goods under one contract and by one voyage from the interior of the State to another State and is therefore commerce among the States even as to such part of the voyage as lies within the State although there might be a transportation of goods which is begun and ended within the State limits, and disconnected with any carriage outside the State and so not constitute commerce among the States; this latter would be subject to State regulation and the statute valid, but the former is National in its character and within the exclusive power of Congress to regulate.⁴⁰

* *People's Gas Light & Coke Co. v. Chicago*, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. 520. See *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567.

* *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 26 Sup. Ct. 66, 50 L. ed. 246, Iowa Code of 1897, § 1754.

* *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 7 Sup. Ct. 4. The statute was held void as to the transportation in question. The court examined, and held that they do not establish a contrary doctrine, the following cases: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, Burlington & Quincy Rd. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Paik v. Chicago & Northwestern Ry.*, 94 U. S. 164, 24 L. ed. 97.

That a State Constitution may prohibit discrimination as to rates, charges

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When competition which controls rates prevails at a given point a dissimilarity of circumstances and conditions is created justifying a carrier in charging a lesser rate to such point it being the longer distance, than it exacts to a shorter distance, and noncompetitive point on the same line. A nearer and noncompetitive point on the same line is not entitled to lower rates prevailing at a longer distance and competitive place on the theory that it could also be made a competitive point if designated lines of railway carriers by combinations between themselves agreed to that end. The competition necessary to produce a dissimilarity of conditions must be real and controlling and not merely conjectural or possible. Where a charge of a higher rate for a longer than a shorter haul over the same line is lawful because of the existence of controlling competition at the longer distance place, the mere fact that the less charge is made for the longer distance does not alone suffice to cause the lesser rate for the longer distance to be unduly discriminatory. And where the commission had found a rate to be unreasonable solely because it was violative of the act which forbids a greater charge for a lesser than for a longer distance under stated conditions and which prohibits undue discrimination, it was held that as the grounds upon which such holding was based resulted from an error of law it was proper not to conclude the question of the inherent unreasonableness of the rates, but to leave it open for the further action by the commission to be considered free from the errors of law which had previously influenced the commission. A carrier, in order to give particular places the benefit of their proximity to a competitive point and thereby afford them a lower rate than they would otherwise enjoy, may take into consideration the rate to the point of competition and make it the basis of rates to the points in question. To give a lower rate as the result of competition does not violate the provisions of the act to regulate commerce. It was also held, that where a rate was based

and facilities, and as to the effect upon connecting roads and through rates, see *Atchison, Topeka & Santa Fe Rd. Co. v. Denver & New Orleans Rd. Co.*, 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185, rev'g 15 Fed. 650.

on an error of fact, which was not complained of before, or acted on by the commission, and had been corrected by the carriers long before the decision below, and the corrected rate had been in force for a long period, it was not necessary to revise the decree of the court below, which was in all other respects correct, so as to secure a continuance of the corrected rate.⁴¹

§ 41. Same Subject.

In a case decided in the Federal Supreme Court, in 1900, it was held that although the Interstate Commerce Commission found in that case as a fact that the competition at Nashville, which formed the basis of contention therein, was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga, or to abandon all Nashville traffic, nevertheless they were forbidden by the act of 1887⁴² to make the lesser charge for the longer haul; but since that ruling of the commission was made it has been settled⁴³ that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point; and it follows that the construction affixed by the commission to the statute upon which its entire action in this case was predicated was wrong. It was also decided that the only principle by which it was possible to enforce the whole statute was the construction adopted in previous opinions of the Federal Supreme Court; that is, that a competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser

⁴¹ *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29, 47 L. ed. 1047, 23 Sup. Ct. 687.

⁴² *Act of February 4, 1887*, c. 104, 24 Stat. 379.

⁴³ *Louisville & Nashville Rd. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. 209, and other cases cited.

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charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that, incidentally, the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it.⁴⁴ A State railroad corporation voluntarily formed cannot exempt itself from the control reserved to the State by its Constitution, and, if not protected by a valid contract, cannot successfully invoke the interposition of Federal courts, in respect to long and short haul clauses in a State Constitution simply on the ground that the railroad is property.⁴⁵

⁴⁴ *East Tennessee, etc., Ry. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. 516. Examine *Louisville & Nashville Rd. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. ed. 416.

⁴⁵ *Louisville & Nashville Rd. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. 95.

CHAPTER V

CONSTITUTIONAL BASIS OF ACTIONS AND DEFENSES—INTERSTATE
COMMERCE ¹

- § 42. Interstate Commerce—Power to Regulate.
- 43. Same Subject.
- 44. Same Subject.
- 45. Regulation of Commerce—District of Columbia—Territories.
- 46. Regulation of commerce — Business Within the State—Combinations — Telegraph Companies—Common Law.
- 47. Interstate Commerce—Regulation and Control—Railroads.
- 48. Interstate Commerce—Regulation and Control—Railroads Continued—Express Companies.
- 49. Interstate Commerce—Constitutionality and Construction of Commodities Clause of Hepburn Act—Railroads—Carriers as Stockholders—Injunction — Mandamus — Penalty.
- 50. State Requirement That Interstate and Other Trains Stop at Specified Stations.
- 51. Interstate Commerce — Police Power — Intoxicating Liquors—Carriers.
- 52. Same Subject—Delivery—Wilson Act—Penalty.
- 53. Interstate Commerce—Intoxicating Liquors Continued—“Arrival”—Original Package—Wilson Act.
- § 54. Same Subject.
- 55. Regulation of Commerce—Insurance.
- 56. Interstate Commerce—Bridges—Navigable Waters—Powers of Congress and of the State.
- 57. Interstate Commerce—Police Power—Regulation of Grain Warehouses, Elevators, Warehousemen, etc.
- 58. Interstate Commerce—Police Power—Quarantine and Inspection Regulations.
- 59. Same Subject.
- 60. Interstate Commerce—Taxation Generally.
- 61. Interstate Commerce—Taxation — Carriers — Express Companies — Vessels—Railroads—Telegraph Companies.
- 62. Interstate Commerce—Taxation—Railroads Continued—Other Property.
- 63. Same Subject—Property Left Temporarily in State.
- 64. Interstate Commerce—Taxation of Bridges and Bridge Companies.

§ 42. Interstate Commerce—Power to Regulate.

The power to regulate interstate commerce is the power to

¹See § 1, herein.

As will appear from the index to this treatise other rules and decisions as

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prescribe rules by which such commerce must be governed but the rules prescribed must have a real and substantial relation to, or connection with, the commerce regulated; and while this power to regulate is great and paramount it cannot be exerted in violation of any fundamental right secured by other provisions of the National Constitution.² Franchises of a corporation chartered by the State are, however, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress to regulate such commerce; and while Congress may not have general visitatorial power over State corporations its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress.³ But one engaging in interstate commerce does not thereby submit all his business to the regulating power of Congress.⁴ And any exercise of State authority, in whatever form manifested, which directly regulates interstate commerce is repugnant to the commerce clause of the Constitution. This is positively asserted.⁵ But while the State may not legislate for the direct control of interstate commerce, a proper police regulation which does not conflict with congressional legislation on the subject involved is not necessarily unconstitutional because it may have an indirect effect upon interstate commerce.⁶

§ 43. Same Subject.

A State or Territory has the right to legislate for the safety

to interstate commerce and its effect upon corporate actions and defenses are considered elsewhere herein under other appropriate headings.

² *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436. This case involved the constitutionality of provisions of the Act of Congress of June 1, 1898, 30 Stat. 424, c. 370, U. S. Comp. Stat. 1901, p. 3205, concerning carriers engaged in interstate commerce and their employes.

³ *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. 370.

⁴ *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. 297. See *United States v. Erie R. Co.* (U. S. D. C.), 166 Fed. 352, 355.

⁵ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 223, 29 Sup. Ct. 633, 634; *Atlantic Coast Line Rd. Co. v. Wharton*, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. 121, 123.

⁶ *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. ed. 778.

and welfare of its people, which is not taken from it because of the exclusive right of Congress to regulate interstate commerce; and an inspection law affecting interstate commerce is not for that reason invalid unless it is in conflict with an act of Congress or an attempt to regulate interstate commerce.⁷ Again, the power of the Federal Government to regulate commerce is not in conflict with the reserved rights of the several States under the Constitution, nor does it deprive them of the power to pass laws in the nature of police regulations under what is known as the police power, but on all matters that are the subjects of commerce within the meaning of the Federal Constitution, such regulations must be limited to subjects of police control and must not in themselves be regulations of commerce.⁸ And the rule is fully recognized that, "The effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident."⁹ Legislation, therefore, which is an

⁷ *McLean v. Denver & Rio Grande Rd. Co.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. ed. 78.

⁸ *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23. See §§ 7-9, herein.

⁹ *Louisville & Nashville Rd. Co. v. Eubank*, 184 U. S. 27, 38, 22 Sup. Ct. 27, 46 L. ed. 416 (a case of carriers; regulation of rates; long and short hauls; *Kentucky* Constitution; held invalid so far as made applicable to or affecting interstate commerce), per Mr. Justice Peckham, citing and considering *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 7 Sup. Ct. 4 (a case as to constitutional law; railroads; transportation charge; discrimination in; invalidity of Illinois statute; interstate commerce; what constitutes; interference with; power of Congress; and regulation of State statutes. Distinguishing *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, Burlington & Quincy Rd. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & Northwestern Ry.*, 94 U. S. 164, 24 L. ed. 97); *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547 (a case of constitutional law; commerce regulation; transportation of passengers; and Louisiana statute;

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attempt, in virtue of the police power of the State, to regulate interstate commerce must yield, so far as there is a conflict, to the powers which belong exclusively to Congress.¹⁰ So a State may not under pretense of protecting the public health exclude the products of merchandise of other States, and the court will determine for itself whether it is a genuine exercise of the police power or really and substantially a regulation of interstate commerce.¹¹

§ 44. Same Subject.

A State may, however, in the absence of express action by Congress or by the Interstate Commerce Commission, regulate for the benefit of its citizens local matters affecting interstate commerce.¹² The following general rules have also been asserted: (a) The power to regulate commerce, interstate and foreign, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. (b) Such commerce is a subject of national character and requires uniformity of regulation. (c) Interstate commerce by corporations is entitled to the same protection against State exactions which is given in such commerce when carried on by individuals. (d) As to those subjects of commerce which are local or limited in their nature or sphere of operation, the State may prescribe regulations until Congress assumes control of them. And (e) as to such as are national in their character, and require uniformity of regulation, the power of Congress is exclusive; and until Congress acts, such commerce is entitled to be free from State exaction and burdens.¹³ The regulation of commerce held unconstitutional and void to the extent that it was a regulation of interstate commerce).

Principal case is cited in *State, ex rel. Railroad Commission, v. Adams Express Co.* (Ind., 1908), 85 N. E. 966, 967.

¹⁰ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 222, 29 Sup. Ct. 633, 634.

¹¹ *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. 485.

¹² *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 29 Sup. Ct. 214.

¹³ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 5

between the States is of such comprehensive reach as to affect all the citizens of all the States of the Union, and it is unnecessary that Congress should first exercise its authority to regulate before the States would be restricted in their legislative power. The Federal Constitution is itself restrictive of such local authority, and the power of Congress is accordingly exclusive.¹⁴ It is held, however, that the question whether, when Congress

Sup. Ct. 826. See *Butterfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 252; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 31 L. ed. 700, 8 Sup. Ct. 689, 1062; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. 739; *Railroad Co. (Hannibal & St. Joseph Rd. Co.) v. Husen*, 95 U. S. 465, 24 L. ed. 527 (now can such power be exercised over the interstate transportation of subjects of commerce).

¹⁴ *La Moine Lumber & Trading Co. v. Kesterson* (U. S. C. C.), 171 Fed. 960, 963, per Wolverton, Dist. J. Compare next following section, herein.

Commerce regulation—as to exclusive or concurrent powers of Congress and the States, see the following cases: *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. ed. 972; *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 620, 622, 29 Sup. Ct. 214, 53 L. ed. 352; *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. ed. 778; *McLean v. Denver & Rio Grande Ry. Co.*, 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. 1; *New York, New Haven & Hartford Rd. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 596; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 436; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. 559; *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. ed. 1200; *Robbins v. Shelby Co. Tax Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. ed. 694; *Wabash, St. Louis & P. Ry. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 7 Sup. Ct. 4; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. 1114; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635, 29 L. ed. 785; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. 1091; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 5 Sup. Ct. 826; *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. 247; *Mobile, County of, v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543; *Lottawanna, The*, 21 Wall. (88 U. S.) 558, 22 L. ed. 654; *State Freight Tax Case*, 15 Wall. (82 U. S.) 232, 21 L. ed. 146; *Crandall v. Nevada*, 6 Wall. (73 U. S.) 35, 18 L. ed. 745; *License Tax Cases*, 5 Wall. (72 U. S.) 462, 18 L. ed. 497; *Gilman v. Philadelphia*, 3 Wall. (70 U. S.) 713, 18 L. ed. 96; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. (59 U. S.) 421, 15 L. ed. 435; *Passenger Cases*, 7 How. (48 U. S.) 283, 12 L. ed. 702; *License Cases*, 5 How. (46 U. S.) 504, 573, 12 L. ed. 256; *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23.

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fails to provide a regulation by laws as to any particular subject of commerce among the States, it is conclusive of its intention that that subject shall be free from positive regulation, or that, until Congress intervenes, it shall be left to be dealt with by the States, is one to be determined by the circumstances of each case as it arises.¹⁵ The Interstate Commerce Act embraces the whole field of interstate commerce; it does not exempt such foreign commerce as is carried on a through bill of lading, but in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.¹⁶

§ 45. Regulation of Commerce—District of Columbia—Territories.

The power of Congress to regulate commerce in the District of Columbia and Territories is plenary and does not depend upon the commerce clause, and a statute regulating such commerce necessarily supersedes a territorial statute on the same subject. So an act of Congress may be unconstitutional as measured by the commerce clause, and constitutional as measured by the power to govern the District of Columbia and the Territories, and the test of separability is whether Congress would have enacted the legislation exclusively for the District and the Territories.¹⁷

¹⁵ *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. ed. 700.

Commerce regulation—effect of nonexercise of power of Congress, see *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. ed. 523; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. 454; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. ed. 257; *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Crandall v. Nevada*, 6 Wall. (73 U. S.) 35, 18 L. ed. 745.

¹⁶ *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681.

¹⁷ *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. —, 30 Sup. Ct. —, aff'g 117 S. W. 426, and approving *Hyde v. Southern Ry. Co.*, 31 App. D. C. —.

As to power of Congress to enact discriminatory legislation under the

§ 46. Regulation of Commerce—Business Within the State—Combinations — Telegraph Companies — Common Law.

The fact that a corporation is engaged in interstate commerce does not deprive the State of power to exercise reasonable control over its business done wholly within the State.¹⁸ So, although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce; nor does it acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate.¹⁹ Again, a statute of a State, intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress; and such statutes are void

commerce clause of the Constitution, see *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. 527, noted in *District of Columbia v. Brooke*, 214 U. S. 138, 149, 53 L. ed. 941, 29 Sup. Ct. 560, as holding, "that Congress may in the exercise of the powers to regulate commerce among the States, discriminate between commodities and between carriers engaged in such commerce, and it was said that the assertion that 'injustice and favoritism' might 'be operated thereby,' could 'have no weight in passing upon the question of power.' " In the citing case (214 U. S. 138, 149) it was held that if the power of Congress to enact discriminatory legislation as to the District of Columbia is limited either expressly or by implication, the prohibition cannot be stricter or more extensive than the due process and equal protection clauses of the Fourteenth Amendment upon the States. But, *quære*, and not decided whether there is any prohibition on Congress from enacting discriminatory legislation, and whether, in the absence of any express prohibition to that effect, any prohibition can be implied, especially in regard to the exercise of police power in the District of Columbia.

» *McGuire v. Chicago, Burlington & Quincy Rd. Co.*, 131 Iowa, 340, 108

N. W. 902.

» *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. 96.

even as to that part of such transmission which may be within the State.²⁰

The giving telegraph companies the right to construct and operate their lines through, along and over the public domain, military or post roads and navigable waters of the United States, was a legitimate regulation of commercial intercourse by telegraph among the States and appropriate legislation to carry into execution the power of Congress over the postal service; it was merely an exercise of national power to withdraw such intercourse from State control and interference.²¹ Again, the powers conferred upon Congress to regulate commerce with foreign nations and among the several States, and to establish post offices and post roads, are not confined to the instrumentalities of commerce, or of the postal service known or in use when the Constitution was adopted, but keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They were intended for the government of the business to which they relate, at all times and under all circumstances; and it is not only the right but the duty of Congress to take care that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation.²²

There is no body of Federal common law, separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statutes enacted

²⁰ *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 7 Sup. Ct. 4. *Examine Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 298, 43 L. ed. 702, 19 Sup. Ct. 451, per Mr. Justice Harlan. Compare *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 31 L. ed. 700, 8 Sup. Ct. 689, 1062; *McGuire v. Chicago, Burlington & Quincy Rd. Co.*, 131 Iowa, 340, 369, 108 N. W. 902.

²¹ *Western Union Telegraph Co. v. Pennsylvania Rd. Co.*, 105 U. S. 540, 49 L. ed. 412, 25 Sup. Ct. 133; Act of Congress, July 24, 1866, 14 Stat. 221, Rev. Stat., §§ 5263 *et seq.* See Joyce on Electric Law (2d ed.), §§ 38-67. See also *Id.*, §§ 30-37c, 68-83, 130-140a.

²² *Pensacola Telegraph Co. v. Western Union Tele. Co.*, 96 U. S. 1, 24 L. ed. 708.

by the several States. The principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment.²³

§ 47. Interstate Commerce—Regulation and Control— Railroads.

Congress has undoubted power to subject to regulations adopted by it every carrier engaged in interstate commerce.²⁴ But so far as the will of Congress respecting commerce among the States by means of railroads can be determined from the enactment of the provisions of the law to be found in the Revised Statutes,²⁵ they are indications of an intention that such transportation of commodities between the States shall be free except when restricted by Congress, or by a State with the express permission of Congress.²⁶ And Congress has authorized every railroad company in the United States to carry all passengers and freight over its road from one State to another State and receive compensation therefor;²⁷ and any exercise of State authority directly regulating interstate commerce is repugnant to the commerce clause of the Constitution.²⁸

²³ *Western Union Telegraph Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. 561.

As to abrogation by Interstate Commerce Act of common-law remedy for recovery of unreasonable charges, see *Texas & Pacific Ry. Co. v. Cisco Oil Mill Co.*, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. 358.

²⁴ *New York, New Haven & Hartford Rd. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. ed. 596.

²⁵ *Rev. Stat. U. S.*, §§ 4252-4289; *Id.*, chap. 6, title 48, § 5258.

²⁶ *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 609, 31 L. ed. 700.

²⁷ "Section 5258 of the Revised Statutes of the United States (U. S. Comp. Stat., 1901, p. 3564) provides, 'Every railroad company in the United States * * * is hereby authorized to carry upon and over its road * * * all passengers * * * freight, and property on their way from any State to another State, and to receive compensation therefor.' *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. 252; *Wabash, St. Louis & Pac. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Comm. Rep. 31, 7 Sup. Ct. 4." *Adams Express Co. v. Kentucky*, 214 U. S. 218, 223, 29 Sup. Ct. 633, 53 L. ed. 972.

²⁸ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633; At-

While railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, they have the legal right, after all these local conditions have been met, to adopt special provisions for through traffic, and legislative interference therewith is an infringement upon the clause of the Constitution which requires that commerce between the States shall be free and unobstructed.²⁹ So the interstate transportation of cars from another State which have not been delivered to the consignee, but remained on the track of the railroad company in the condition in which they were originally brought into the State is not completed and they are still within the protection of the commerce clause of the Constitution.³⁰ Again, an absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a specified day, to transport merchandise to another State, regardless of every other consideration except strikes and other public calamities, transcends the police power of the States and amounts to a burden upon interstate commerce; and articles of a State statute which constitute such a requirement, are, when applied to interstate commerce shipments, void as a violation of the commerce clause of the Federal Constitution. Such a regulation cannot be sustained as to interstate commerce shipments as an exercise of the police power of the State.³¹ But a statute of a State, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for an injury happening within the State under a contract for interstate trans-

Atlantic Coast Line v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. 121. See *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. ed. 700.

²⁹ *Cleveland, C. C. & St. L. Ry. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. ed. 868.

³⁰ *McNeill v. Southern Railway Co.*, 202 U. S. 543, 50 L. ed. 1143, 26 Sup. Ct. 722.

³¹ *Houston & Texas Central R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. 491; Rev. Stat. Tex., Articles 4997-5000.

portation, contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce.³² So the statutes of New York regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto, were passed in the exercise of powers resting in the State in the absence of action by Congress, and, when applied to interstate commerce, do not violate the Constitution of the United States.³³ Again, a cab service maintained by the Pennsylvania Railroad Company to take passengers to and from its terminus in the city of New York, for which the charges are separate from those of other transportation and wholly for service within the State of New York, is not interstate commerce, although all persons using the cabs within the company's regulations are either going to or coming from the State of New Jersey by the company's ferry; such cab service is subject to the control of the State of New York and the railroad company is not exempt, on account of being engaged in interstate commerce, from the State privilege tax of carrying on the business of running cabs for hire between points wholly within the State.³⁴

§ 48. Interstate Commerce—Regulation and Control— Railroads Continued—Express Companies.

Although a railroad corporation may be largely engaged in interstate commerce it is amenable to State regulation and taxation as to any of its service which is wholly performed within the State and not as a part of interstate commerce.³⁵ Where a State statute applies to both intrastate and interstate

³² *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. ed. 688.

³³ *New York, New Haven & Hartford Rd. Co. v. New York*, 165 U. S. 62, 41 L. ed. 853, 17 Sup. Ct. 418; Laws of 1887, c. 616; Laws of 1888, c. 189.

³⁴ *Pennsylvania Rd. Co. v. Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. 202, *aff'g* 171 N. Y. 354.

³⁵ *Pennsylvania Rd. Co. v. Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. 202, *aff'g* 171 N. Y. 354.

shipments, but the shipment involved is wholly intrastate the court will not consider the validity of the statute when applied to interstate shipments.³⁶ A State may also, in the exercise of its police power, by a regulation designed to secure the well-being and to promote the general welfare of the people within the State, prohibit the running of freight trains within its limits on Sunday; and even though such legislation may affect interstate commerce in a limited degree it is not for that reason a regulation of that commerce or a needless intrusion upon the domain of Federal jurisdiction, especially where there is nothing in the legislation that suggests an intent to regulate interstate commerce or that the enactment was for any other purpose than to prescribe a rule of civil duty for all who, on Sunday, are within the territorial jurisdiction of the State; and such regulation will be held in force until superseded and displaced by some act of Congress, passed in the execution of the power granted to it by the Constitution.³⁷ Although carriers by express have the common-law right to reasonably fix their tolls with reference to the extent of the service rendered and may establish reasonable delivery limits within a city or town, still, in Indiana the legislature may require, under penalty, express companies to deliver to the consignee express matter received by them free of any delivery charge in cities having a population of more than a certain number specified in the statute, and may, on refusal of the company to comply with the statute, enforce the penalty in the absence of any Federal statute governing the interstate shipment of goods by express. If, however, such an act should be so construed, as to apply to interstate shipments, it could not be said that it is not a regulation of commerce, much less that it could not come in conflict with the power of regulation imposed in the interstate commerce commission. It might be, however, that if it were found that the companies were casting upon their other traffic the expense of long and burdensome free deliveries an order

³⁶ *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. 23, *aff'g* 73 S. C. 71.

³⁷ *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. 1066.

would be made forbidding the same and substituting a reasonable regulation or practice designed to give greater equality. Such a consideration would operate to suspend the State statute as to interstate shipments by express; and besides, any State enactment which imposes a local burden of transportation which in its operation would require the carrier to adjust his interstate rate with reference thereto, amounts to an attempted regulation of interstate commerce and is, therefore, void as to such transactions. The Interstate Commerce Act, however, as amended by the Railroad Act of 1906, supersedes a State statute legislating as to the same subject-matter.²⁸

§ 49. Interstate Commerce—Constitutionality and Construction of Commodities Clause of Hepburn Act—Railroads—Carriers as Stockholders—Injunction—Mandamus—Penalty.

In an important case recently decided in the Federal Supreme Court it appeared that: after the first day of May, 1908, the Government of the United States commenced proceedings by bill in equity against each of certain corporations, to enjoin each from carrying in interstate commerce any coal produced under the circumstances hereinafter stated. At the same time a petition in mandamus was filed against each corporation, seeking to accomplish the same result. Both the equity cases and the mandamus proceedings were based upon the assumption that the first section of the act to regulate commerce, as amended and re-enacted by the law usually referred to as the Hepburn Act,²⁹ contained a provision, generally known as the commodities clause, which caused it to be illegal for the corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of the modes below stated.

²⁸ *State v. Adams Express Co.* (Ind., 1908), 85 N. E. 966, 83 N. E. 337; Ind. Acts of 1901, p. 97, c. 62; Burns' Ann. Stat., 1901, § 3312a; Act of Congress of Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 (U. S. Comp. Stat., 1901, p. 3156) as am'd by Rd. Act of June 29, 1906, c. 3591, § 3, 34 Stat. 589 (U. S. Comp. Stat., 1907, pp. 899 *et seq.*).

²⁹ Approved June 29, 1906, c. 3591, 34 Stat. 584.

Except in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities clause, they all defended substantially upon the ground that when correctly interpreted the commodities clause did not forbid the interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution because the right to enact it was not embraced within the authority conferred upon Congress to regulate commerce. In addition it was contended that even if, abstractly considered, the grant might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the Fifth Amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of property which the corporations possessed and had long enjoyed under the sanction of valid State laws. It was besides insisted that in any event the clause was repugnant to the Constitution, because of the discrimination caused by the exception as to timber and the manufactured products thereof. Aside from the contention of one of the corporations, above noted, that it was not a railroad company within the meaning of that term as used in the statute, because it was merely a coal company whose transporting operations were but incidental to its mining operations, the corporations, parties to the record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other States. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had

acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads not only owned but also leased and operated coal mines, and carried the coal produced from such mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal so produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for persons to whom the coal had been sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the case as to some of the railroad companies who, as above stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been possessed by them for a long time and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other States, in which the companies likewise, in part, carried on their business. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause of the above statute as having the meaning which the Government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject was at least formally approached, not for the purpose of determining whether inherently the commodities clause was within the competency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the corporations were found to enjoy as a result of valid State laws. It was decided below that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce; a member of the court dissented in a written opinion. Judgments and decrees were entered denying the application for mandamus and dismissing

the bills of complaint. The Federal Supreme Court, in reversing and remanding with directions for such further proceedings as might be necessary to apply and enforce the statute as interpreted by it, held that: (1) Although a limitation to its operation might be reasonable and thus assuage the radical results of a prohibitory statute, if it is not expressed in the statute, to engraft such a limitation would be pure judicial legislation. In construing the commodities clause of the Hepburn Act the suggestion of the Government to limit its application to commodities while in the hands of a carrier or its first vendee, and, as thus construed, extend the indirect interest prohibition to commodities belonging to corporations the stock whereof is owned in whole or in part by the carrier, or those which had been mined, manufactured or produced by the carrier prior to the transportation, cannot be accepted. (2) The duty of the Federal Supreme Court in construing a statute which is reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, to adopt that construction which saves its constitutionality⁴⁰ includes the duty of avoiding a construction which raises grave and doubtful constitutional questions if the statute can be reasonably construed so as to avoid such questions.⁴¹ (3) This rule applied to the commodities clause of the Hepburn Act so as to avoid deciding the constitutional questions which would arise if the clause were construed so as to prohibit the carrying of commodities owned by corporations of which the carrier is a shareholder, or which it had mined, manufactured or produced at some time prior to the transportation. (4) Where ambiguity exists it is the duty of a court construing a statute to restrain the wider and doubtful provisions so as to make them accord with the narrow and more reasonable provisions and thus harmonize the statute. (5) A prohibition in an act of Congress will not be extended to include a subject where the extension raises

⁴⁰ Citing *Knights Templar Indemnity Co. v. Jarman*, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108.

⁴¹ Citing *Harriman v. Interstate Com. Comm.*, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. 115.

grave constitutional questions as to the power of Congress, where one branch of that body rejected an amendment specifically including such subject within the prohibition. (6) In the construction of a statute the power of the lawmaking body to enact it, and not the consequences resulting from the enactment, is the criterion of constitutionality. (7) The provision contained in the Hepburn Act⁴² commonly called the commodities clause, does not prohibit a railway company from moving commodities in interstate commerce because the company has manufactured, mined or produced them, or owned them in whole or in part, or has had an interest, direct or indirect, in them, wholly irrespective of the relation or connection of the carrier with the commodities at the time of transportation. (8) The provision of the commodities clause relating to interest, direct or indirect, does not embrace an interest which a carrier may have in a producing corporation as the result of ownership by the carrier of stock in such corporation, provided the corporation has been organized in good faith. (9) Rejecting the construction placed by the Government upon the commodities clause, it is decided that that clause, when all its provisions are harmoniously construed, has solely for its object to prevent carriers engaged in interstate commerce from being associated in interest at the time of transportation with the commodities transported, and it therefore only prohibits railroad companies engaged in interstate commerce from transporting in such commerce commodities under the following circumstances and conditions: (a) When the commodity has been manufactured, mined or produced by a railway company or under its authority and at the time of transportation the railway company has not in good faith before that act of transportation parted with its interest in such commodity; (b) when the railway company owns the commodity to be transported in whole or in part; (c) when the railway company at the time of transportation has an interest, direct or indirect, in a legal sense in the commodity, which last prohibition does not apply to commodities manufactured, mined, produced,

⁴² Approved June 29, 1906, c. 3591, 34 Stat. 584.

owned, etc., by a corporation because a railway company is a stockholder in such corporation. Such ownership of stock in a producing company by a railway company does not cause it as owner of the stock to have a legal interest in the commodity manufactured, etc., by the producing corporation. (10) As thus construed the commodities clause is a regulation of commerce inherently within the power of Congress to enact.⁴³ The contention that the clause if applied to pre-existing rights will operate to take property of railroad companies and therefore violate the due process provision of the Fifth Amendment, having been based upon the assumption that the clause prohibited and restricted in accordance with the construction which the Government gave that clause is not tenable as to the act as now construed which merely enforces a regulation of commerce by which carriers are compelled to dissociate themselves from the products which they carry and does not prohibit where the carrier is not associated with the commodity carried. (11) The constitutional power of Congress to make regulations for interstate commerce is not limited by any requirement that the regulations should apply to all commodities alike, nor does an exception of one commodity from a general regulation of interstate commerce necessarily render a statute unconstitutional as discriminating between carriers; and the exception of timber in the commodities clause of the Hepburn Act does not render the act unconstitutional, nor can the question of the expediency of such an exception affect the question of power. (12) Where, as in this instance, the provision for penalties is separable from the provisions for regulations, the court will not consider the question of the constitutionality of the penalty provisions in a suit brought by the Government to enjoin carriers from violating the regulations and in which no penalties are sought to be recovered. (13) As the construction now given the act differs widely from the construction which the Government gave to the act and which it was the purpose of these suits to enforce, it is not necessary

⁴³ Citing *New Haven Railroad v. Interstate Com. Comm.*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. 272.

in reversing and remanding, to direct the character of decrees which shall be entered, but simply to reverse and remand the case with directions to enforce and apply the statute as it is now construed. (14) Although the Delaware and Hudson Company may originally have been chartered principally for mining purposes, as it is now engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, it is a railroad company within the purview of the commodities clause and is subject to the provisions of that clause as they are now construed.⁴⁴

§ 50. State Requirement That Interstate and Other Trains Stop at Specified Stations.⁴⁵

Whether an order stopping interstate trains at specified stations is a direct regulation of interstate commerce depends on the local facilities at those stations, inability of fast interstate trains to make schedule, loss of patronage and compensation for carrying the mails, and the inability of such trains to pay expenses if additional stops are required are all matters to be considered in determining whether adequate facilities

⁴⁴ *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. 527, rev'g 164 Fed. 215, cited in *District of Columbia v. Brooke*, 214 U. S. 138, 149, 53 L. ed. 941, 29 Sup. Ct. 560, as holding, "That Congress may in the exercise of the powers to regulate commerce among the States, discriminate between commodities and between carriers engaged in such commerce. And it was said that the assertion that 'injustice and favoritism' might 'be operated thereby,' could 'have no weight in passing upon the question of power.'" In the citing case the question, in connection with the citation, was discrimination, the power of Congress and police power.

In a case as to the construction of the Commerce Act and the reasonableness of terminal charges the court, per Mr. Justice Brewer, in discussing the case in delivering the opinion of the court, said: "Further, it is shown by the affidavits that the amount of such terminal charge is not entered upon the general freight charges of the companies, but is kept as a separate item. The Union Stock Yards Company is an independent corporation and the fact, if it be a fact, that most or even all of its stock is owned by the several railroad companies entering into Chicago does not make its line or property part of the lines or property of the separate railroad companies." *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. ed. —, 30 Sup. Ct. —.

⁴⁵ See § 118, herein.

have been furnished to the stations at which the company is ordered by State authorities to stop such trains; and while the sufficiency of the facilities above mentioned is not of itself a Federal question, it may be considered by the United States Supreme Court for the purpose of determining whether an order, requiring interstate trains to stop at stations within the State already adequately supplied with transportation facilities, does or does not regulate interstate commerce, and such an order made directly or through the instrumentality of a commission is void where the local facilities are, as above stated, adequate.⁴⁶

So where a State statute required all regular passenger trains to stop a sufficient length of time at county seats to receive

⁴⁶ *Atlantic Coast Line Rd. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. 121, 123, rev'g 74 S. C. 80, 53 S. E. 290. The court, per Justice Peckham, says: "The term 'adequate or reasonable facilities' is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the convenience and cost. * * * That the inhabitants of a place demand greater facilities than they have is not at all conclusive as to the reasonableness of their demand for something more. * * * To stop these trains at Latta" (the station covered by the order) "and other stations like it, which could bring equally strong reasons for the stoppage of trains at their stations would wholly change the character of the trains" (as to speed) "and would result in the inability of what had been fast trains to make their schedule time, and a consequent loss of patronage, also the loss of compensation for carrying the mails, which would be withdrawn from them, and the end would be the withdrawal of the trains, because of their inability to pay expenses. All these are matters entitled to consideration when the question of convenience and adequate facilities arises. * * * Of course it is not reasonable to suppose that the same facilities can be given to places of very small population that are supplied to their neighbors who live in much larger communities. * * * Nevertheless the fair needs of the locality for transportation to other local points must be considered and provided for. This, as we think, has been done." See *Mississippi Railroad Commission v. Illinois Central Rd. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209. Examine *Atlantic Coast Line Rd. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585. The judgment of the State Supreme Court, in the principal case, directing a mandamus was held erroneous and reversed and the case remanded.

and let off passengers with safety, it appeared that the defendant company furnished four regular passenger trains per day each way, which were sufficient to accommodate all the local and through business, and that all such trains stopped at county seats; the act was held to be invalid as applied to an express train intended only for through passengers from St. Louis to New York.⁴⁷ But it has been held that the statute of Ohio relating to railroad companies, in that State, which provides that, "Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers; if a company, or any agent or employé thereof, violate, or cause or permit to be violated, this provision, such company, agent or employé shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the State, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county; and in all cases in which a forfeiture occurs under the provision of this section, the company whose agent or employé caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held, *prima facie*, to have caused the violation" is not, in the absence of legislation by Congress on the subject, repugnant to the Constitution of the United States, when applied to interstate commerce through the State of Ohio on the Lake Shore and Michigan Southern Railway.⁴⁸ In another case it is decided that a State may require all regular passenger trains running wholly within the State to stop at stations at county seats long enough to discharge and take on passengers with safety.⁴⁹

⁴⁷ *Cleveland, C. C. & St. L. Ry. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. ed. 868.

⁴⁸ *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. 465.

⁴⁹ *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. 627.

§ 51. Interstate Commerce—Police Power—Intoxicating Liquors—Carriers.

The right to send liquors from one State into another, and the act of sending the same is interstate commerce the regulation of which has been committed by the Federal Constitution to Congress.⁵⁰ A State statute, therefore, which operates as an interference with interstate commerce by prohibiting the bringing intoxicating liquors into a State from another State by interstate carriers is void.⁵¹ And this applies not only to a State law which denies such rights, but also to one which substantially interferes with or hampers the same.⁵² So a State cannot, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained.⁵³ The respective States have, however, plenary

⁵⁰ *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. ed. 1100.

"In *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. 674, 676, Mr. Justice White delivering the opinion of the court said: 'Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a State law which denies such a right or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States,' per Mr. Justice Brewer, in *Adams Express Co. v. Kentucky*, 214 U. S. 218, 222, 29 Sup. Ct. 633, 634, 53 L. ed. 972.

"Liquor, however obnoxious and hurtful it may be in the judgment of many, is a recognized article of commerce. *License Cases*, 5 How. (46 U. S.) 504, 577, 12 L. ed. 256, 289; *Leisy v. Hardin*, 135 U. S. 100-110, 34 L. ed. 128-133, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681," per Mr. Justice Brewer in *Adams Express Co. v. Kentucky*, 214 U. S. 218, 222, 29 Sup. Ct. 633, 634, 53 L. ed. 972.

⁵¹ *Louisville & Nashville Rd. Co. v. F. W. Cook Brewing Co.* (U. S. C. C. A.), 172 Fed. 117. See last preceding note.

⁵² *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. 674. See first note under this section.

⁵³ *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. ed. 700. In this case a statute of Iowa (Iowa Code, § 1553, as amended by chap. 143 of the Acts of the Twentieth General Assembly in 1886) forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without being first furnished with

power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the States, provided, always, they do not transcend the limits of State authority by invading rights which are secured by the Federal Constitution, and provided further that the regulations as adopted do not operate as a discrimination against the rights of residents and citizens of other States of the Union.⁵⁴

§ 52. Same Subject—Delivery—Wilson Act—Penalty.

Transportation of an article in interstate commerce is not complete until the article is delivered to the consignee:⁵⁵ nor does the Wilson Act⁵⁶ cause State laws to attach to an interstate shipment until the completion of the transit by delivery

a certificate, under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee or person to whom it is to be transported or delivered is authorized to sell intoxicating liquors in the county, although adopted without a purpose of affecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted sale and manufacture of intoxicating liquors within the State, was held to be neither an inspection law, nor a quarantine law, but essentially a regulation of commerce among the States, affecting interstate commerce in an essential and vital part, and not being sanctioned by the authority, express or implied, of Congress, was repugnant to the Constitution of the United States.

⁵⁴ *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. ed. 1100.

States may control liquor traffic. *Lloyd v. Dollison*, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. 703.

⁵⁵ *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. 664.

⁵⁶ That the transportation is not complete until delivery to the consignee is also settled. In *Rhodes v. Iowa*, 170 U. S. 412, 426, 42 L. ed. 1088, 1096, 18 Sup. Ct. 664, 669, it was held that the Wilson Act (26 Stat. 313, chap. 728, U. S. Comp. Stat., 1901, p. 3177) 'was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment and until its arrival at the point of destination, and delivery there to the consignee,' " per Mr. Justice Brewer, in *Adams Express Co. v. Kentucky*, 214 U. S. 218, 222, 29 Sup. Ct. 633, 634, 53 L. ed. 972.

⁵⁷ Act of Aug. 8, 1890, chap. 728, 26 Stat. 313. As to purpose of this act see *Delameter v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. 447.

to the consignee.⁵⁷ So where a code provided that: "If any express company, railway company or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person shall transport or convey between points, or from one place to another within this State, for any other persons or corporation, any intoxicating liquors, without having first been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such county, such company, corporation or person so offending, and each of them, and any agent of said company, corporation or person so offending, shall upon conviction thereof, be fined in the sum of one hundred dollars for each offense and pay costs of prosecution, and the costs shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid;" it was decided that such statute could not be held to apply to a box of spirituous liquors, shipped by rail from a point in another State to a citizen of the State of enactment of said code provision, at his residence in the latter State while in transit from its point of shipment to its delivery to the consignee, without causing the statute to be repugnant to the Federal Constitution. It was further determined that moving such goods in the station from the platform on which they were put on arrival to the freight warehouse was a part of the interstate commerce transportation.⁵⁸ And a State cannot by statute make penal all shipments of liquor which are to be paid for on delivery, commonly called C. O. D. shipments, and provide that the place where the money is paid or the goods delivered shall be deemed to be the place of sale,

⁵⁷ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. ed. 972.

⁵⁸ *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. ed. 1088.

and that the carrier and his agents delivering the goods shall be jointly liable with the vendor, as such a law as applied to shipments from other States is an attempt to regulate interstate commerce.⁵⁹

§ 53. Interstate Commerce—Intoxicating Liquors Continued—"Arrival"—Original Package—Wilson Act.

In the absence of congressional legislation, goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and the word "arrival" as used in the Wilson law means delivery of the goods to the consignee and not merely reaching their destination. Nor does the power of the State over intoxicating liquors from other States in original packages after delivery and before sale, given by the Wilson law, attach before notice and expiration of a reasonable time for the consignee to receive the goods from the carrier, and this rule is not affected by the fact that under the State law the carrier's liability as such may have ceased and become that of a warehouseman.⁶⁰ Again, a State statute prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the State, is, as applied to a sale by the importer in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress

⁵⁹ *Adams Express Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. 609.

⁶⁰ In *Adams Express Co. v. Kentucky*, 206 U. S. 129, 135, 51 L. ed. 987, 991, 27 Sup. Ct. 606, 607, it was said: 'The testimony showed that the package containing a gallon of whiskey, was shipped from Cincinnati, Ohio, to George Meese, at East Bernstadt, Kentucky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the Court of Appeals, and is beyond dispute under the decisions of this court,' " per Mr. Justice Brewer, in *Adams Express Co. v. Kentucky*, 214 U. S. 218, 223, 29 Sup. Ct. 533, 634, 53 L. ed. 972.

⁶¹ *Heyman v. Southern Ry. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. ed. 173, rev'g 118 Ga. 616.

the power to regulate commerce with foreign nations and among the several States.⁶¹ So the power to ship merchandise from one State into another carries with it, as an incident, the right of the receiver of the goods, to sell them in the original packages, any State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State; but since the enactment of 1890⁶² which provides: "That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," while the receiver of intoxicating liquors in one State, sent from another State, has the constitutional right to receive them for his own use, without regard to the State laws to the contrary, he can no longer assert the right to sell them in the original packages in defiance of law. A State statute, therefore, is unconstitutional in so far as it compels the resident of the State who desires to order alcoholic liquors for his own use, to first communicate his purpose to a State chemist, and in so far as it deprives any nonresident of the right to ship by means of interstate commerce any liquor into the State enacting such law unless previous authority is obtained from the officers of that State, where, on the face of such regulations, it is clear that they subject the constitutional right of the nonresident to ship into the State and of the resident of the State to receive for his own

⁶¹ *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128, overruling *Pierce v. New Hampshire*, 5 How. (46 U. S.) 504, 12 L. ed. 256.

⁶² Act of Aug. 8, 1890, chap. 728, 26 Stat. 313, U. S. Comp. Stat., 1901, p. 3177.

use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges.⁶³

§ 54. Same Subject.

Although a State may not forbid a resident therein from ordering for his own use intoxicating liquors from another State it may forbid the carrying on within its borders of the business of soliciting orders for such liquor although such orders may only contemplate a contract resulting from final acceptance in another State.⁶⁴ In another case it is held that: (1) A State statute which operates upon beer and malt liquors shipped from other States after their arrival and while held for sale and consumption within the State, is not an interference with interstate commerce in view of the provisions of the Wilson Act. (2) A State regulation, valid under the Wilson Act, as to liquors shipped from another State after delivery at destination, is not an interference with interstate commerce because it affects traffic in, and deters shipment of, the article into that State. (3) The regulation of the sale of liquor is essentially a police power of the State, and a provision in a State law, tending to determine the purity of malt liquors sold in the State, is an exercise of the same power. And (4) The purpose of the Wilson Act is to make liquor, after its arrival in a State, a domestic

■ *Vance v. W. A. Vandercreek Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. ed. 1100; S. C., act of March 5, 1897, No. 340, amending act of March 6, 1896, No. 61. See *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. 265.

"*Original package.*" Whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates, *quære*. *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. ed. 700. Examine *Cook v. Marshall County, Iowa*, 196 U. S. 261, 25 Sup. Ct. 233, 49 L. ed. 271; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 225, 21 Sup. Ct. 132; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 21, 43 L. ed. 49, 18 Sup. Ct. 757; *Rahrer, In re* 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. 865.

As to purpose of Wilson Act and also as to original package, see *Delameter v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. 447.

■ *Delameter v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. ed. 724.

§ 55 CONSTITUTIONAL BASIS OF ACTIONS AND DEFENSES—

product, and to confer power on the States to deal with it accordingly. The police power is, hence, to be measured by the right of the State to control or regulate domestic products, and this creates a State and not a Federal question as respects the commerce clause of the Constitution; and the Federal Supreme Court cannot review the determination of the State Court that a State statute involved in such a case was not a revenue but an inspection measure.⁶⁶ Again, a State may control the sale of liquor by the dispensary system adopted in South Carolina, but when it does so it engages in ordinary private business which is not, by the mere fact that it is being conducted by a State, exempted from the operation of the taxing power of the National Government.⁶⁶ States also have beyond question the general power to control and regulate within their borders the business of dealing in or soliciting orders for the purchase of intoxicating liquors, especially so since the passage of the Wilson Act.⁶⁷

§ 55. Regulation of Commerce—Insurance.

The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life.⁶⁸ So the Penal Code of a State making it a misdemeanor for a person in the State to procure insurance for a resident therein from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the State relative to insurance, is not a regu-

⁶⁶ *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. 552.

⁶⁶ *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. 110.

⁶⁷ *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. 447.

⁶⁸ *New York Life Ins. Co. v. Cravena*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 962; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 209, 39 L. ed. 297, per Mr. Justice White; *Philadelphia Fire Assoc. v. New York*, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. ed. 342; *Paul v. Virginia*, 8 Wall. (75 U. S.) 168, 19 L. ed. 357. Principal case is cited in *Lottery Case*, 188 U. S. 321, 367, 368, 47 L. ed. 492, 23 Sup. Ct. 321, in dissenting opinion.

lation of commerce, and does not conflict with the Constitution of the United States, when enforced against the agent of a New York firm in the code State who, through his principals and by telegram, procured for a resident in such code State applying for it there, marine insurance on an ocean steamer, from an insurance company incorporated under the laws of Massachusetts, and which had not filed the bond required by the laws of the code State.⁶⁹ In the absence of action on the part of Congress a State may regulate the conduct of local delivery of telegraph messages after the interstate transit by wire is completed.⁷⁰

§ 56. Interstate Commerce—Bridges—Navigable Waters—Powers of Congress and of the States.

The navigable waters of the United States include such as are navigable in fact, and which, by themselves or their connections, form a continuous channel for commerce with foreign countries or among the States. Over these Congress has control by virtue of the power vested in it to regulate commerce with foreign nations and among the several States.⁷¹ So commerce

⁶⁹ *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 209, 40 Cent. L. J. 228.

⁷⁰ *Western Union Teleg. Co. v. Wilson*, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. 403, citing *Western Union Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 105, 16 Sup. Ct. 934.

⁷¹ *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. 228.

As to commerce and navigable waters see the following cases: *Leovy v. United States*, 177 U. S. 621, 44 L. ed. 914, 20 Sup. Ct. 797; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. 157; *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. ed. 747; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. ed. 808; *Illinois Cent. Rd. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. 110; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. 811; *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 8 Sup. Ct. 113, 31 L. ed. 149; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. 313; *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442; *Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Railroad Co. v. Richmond*, 19 Wall. (86 U. S.) 584, 22 L. ed. 173; *Montello, The*, 11 Wall. (78 U. S.) 411, 20 L. ed. 191; *Gilman v. Philadelphia*, 3 Wall. (70 U. S.) 713, 18 L. ed. 96; *Pennsylv-*

comprehends navigation; and to free navigation from unreasonable obstructions by compelling the removal of bridges which are such obstructions is a legitimate exercise of the power of Congress to regulate commerce.⁷²

It is also competent for Congress, having authorized the construction of a bridge of a given height, over a navigable water, to empower the Secretary of War to determine whether the proposed structure will be a serious obstruction to navigation, and to authorize changes in the plan of the proposed structure.⁷³ But acts of Congress which merely regulate the height of bridges over a navigable river and the width of their spans in order that they may not interfere with navigation, and which declare that such bridges shall be regarded as post roads, confer no right or franchise on a bridge company to erect an interstate bridge or collect tolls for its use, and do not interfere with the right of the State granting the bridge company the right to erect such bridge to impose taxes.⁷⁴

The doctrine has been asserted and reasserted, however, that in the absence of legislation by Congress a State may authorize a navigable stream within its limits to be obstructed by a bridge or highway.⁷⁵ So a State may authorize extensions thereon of an interstate bridge and connections therewith necessary to make it available for the use contemplated where its construction has been authorized by Congress, and even though such extensions and connections were not within the plans and specifications as approved by the Secretary of War, the con-

vania v. Wheeling & Belmont Bridge Co., 18 How. (59 U. S.) 421, 15 L. ed. 435; *Veazie v. Moor*, 14 How. (55 U. S.) 568, 14 L. ed. 545; *United States v. Coombs*, 12 Pet. (37 U. S.) 72, 9 L. ed. 1004; *New York v. Miln*, 11 Pet. (36 U. S.) 102, 9 L. ed. 648; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. (27 U. S.) 245, 7 L. ed. 412; *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23. See note at end of this section.

⁷² *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. 367.

⁷³ *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. 228.

⁷⁴ *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. 532.

⁷⁵ *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. 423.

demnation of the land necessary for their construction does not contravene an act of Congress making it unlawful to deviate in the construction of any bridges over navigable waters from the plan approved by said Secretary.⁷⁶

⁷⁶*Stone v. Southern Illinois Bridge Co.*, 206 U. S. 267, 51 L. ed. 1057, 27 Sup. Ct. 615, aff'g 194 Mo. 175.

See also as to bridges the following cases: *Chicago, Burlington & Quincy Ry. Co. v. Drainage Comm'rs*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596, aff'g 212 Ill. 103, 72 N. E. 219 (constitutional law; police power of State; drainage; removal of railroad bridge); *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626, 20 Sup. Ct. 205, 44 L. ed. 299 (interstate bridge; Federal franchise; interstate commerce; taxation; assessment of entire capital); *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 624, 43 L. ed. 523, 835, 19 Sup. Ct. 545, 553 (bridge extending to State water boundary; bridge authorized by Congress; State's power of taxation; municipal taxation; nonexemption from taxation; constitutional law); *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. ed. 747 (interstate commerce; bridges; navigable waters); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962 (interstate bridge; regulation of interstate commerce; constitutional law; powers of Congress; limitation of State's authority; tolls; corporation contract with States); *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. ed. 808 (commerce regulation; power of Congress; interstate bridge; constitutional law); *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. 114 (taxation of bridge; commerce; agency of Government); *Hannibal & St. Joseph Rd. Co. v. Missouri River Packet Co.*, 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. 874 (interstate bridge; when not a lawful structure within meaning of act of Congress); *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. 811 (bridging navigable river below port of entry; police power of State); *Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249, 4 Sup. Ct. 249 (counties; common law and statutory powers as to bridges); *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442 (commerce regulation; concurrent powers; authority of State and city over bridges over navigable waters); *Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143 (bridges over navigable waters; power of Congress to regulate); *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921 (State legislative power; toll bridge franchise; obligation of contract); *Railroad Co. v. Richmond*, 19 Wall. (86 U. S.) 584, 22 L. ed. 173 (interstate commerce; bridges over Mississippi River; enforcement of grain elevator contract); *Clinton Bridge, The*, 10 Wall. (77 U. S.) 454, 19 L. ed. 969 (interstate bridge as post route; powers of Congress; constitutional law); *Gilman v. Philadelphia*, 3 Wall. (70 U. S.) 713, 18 L. ed. 96 (commerce regulation; bridges over navigable waters; power of Congress; injunction; suit by riparian owner); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. (59 U. S.) 421, 15 L. ed. 435 (commerce regulation; power of Congress; obstructions of navigation; bridge over Ohio river; concurrent powers of State and Federal Governments).

§ 57. Interstate Commerce—Police Power—Regulation of Grain Warehouses, Elevators, Warehousemen, etc.

As a matter of domestic concern a State may prescribe regulations for warehousing and inspecting grain and for public warehouses generally, situated and carrying on their business exclusively within her borders, even though they are used as instruments by those engaged in interstate as well as in State commerce; and until Congress acts in reference to their interstate relations, such regulations are enforceable, notwithstanding they may indirectly operate upon commerce beyond her immediate jurisdiction. A case may exist, however, which precludes a State, under the form of regulating her own affairs, from encroaching in the above matters upon the exclusive domain of Congress in respect to interstate commerce.⁷⁷ It is also a legitimate exercise of the police power over a business affected by a public interest and not in violation of the Federal Constitution for a State to provide by statute for a maximum charge for elevating, receiving, weighing and discharging grain, and that in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading.⁷⁸ But a statute regulating grain warehouses and weighing and handling of grain and declaring elevators, etc., to be public warehouses, and their owners to be public warehousemen, and requiring them to give bond for the faithful performance of their duty as such, also fixing rates of storage, and requiring them to keep insured for the owner's benefit all grain stored with them, does not apply to elevators built by a person only for the purpose of storing his own grain, and not to receive and store the grain of others, and, being so construed, such an enactment does not deny the equal protection of the

⁷⁷ *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

⁷⁸ *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247. *Explaining Chicago, Minneapolis & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462.

laws to the owner of an elevator made a public warehouse by it, nor does it deprive him of his property without due process of law, nor amount to a regulation of commerce between the States, and is not in conflict with the Federal Constitution.⁷⁹

§ 58. Interstate Commerce—Police Power—Quarantine and Inspection Regulations.

While a State may enact sanitary laws, and for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the State, it cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory; and the power vested in Congress to regulate commerce precludes State quarantine regulations affecting the transportation of cattle by interstate railroads and interfering with interstate commerce. Such regulations are not a legitimate exercise of the police power of a State; that power cannot be exercised over the interstate transportation of subjects of commerce.⁸⁰

⁷⁹ *Brass v. Stoeser*, 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. 857.

⁸⁰ *Railroad Co. (Hannibal & St. Joseph Rd. Co.) v. Husen*, 95 U. S. 465, 24 L. ed. 527. *Examine Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. 485, aff'g 60 Kan. 51; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. 92, aff'g 29 Colo. 333, 68 Pac. 228; *Missouri, Kansas & T. R. Co. v. Haber*, 169 U. S. 613, 628, 42 L. ed. 878, 18 Sup. Ct. 488.

The principal case is cited in *Keller v. United States*, 213 U. S. 138, 144, 53 L. ed. 941, 29 Sup. Ct. 470; *Jacobson v. Massachusetts*, 197 U. S. 11, 28, 49 L. ed. 643, 25 Sup. Ct. 358; *Crossman v. Lurman*, 192 U. S. 189, 196, 24 Sup. Ct. 234, 48 L. ed. 401; *Compagnie Française, De Navigation A. Vapeur v. Board of Health*, 186 U. S. 380, 399, 46 L. ed. 1209, 22 Sup. Ct. 811; *Louisiana v. Texas*, 176 U. S. 1, 24, 44 L. ed. 347, 20 Sup. Ct. 251; *Lake Shore & Michigan S. Ry. Co. v. Ohio*, 173 U. S. 285, 300, 325, 19 Sup. Ct. 465, 43 L. ed. 702; *New York v. Roberts*, 171 U. S. 658, 677, 19 Sup. Ct. 235, 43 L. ed. 345 (in dissenting opinion); *Schollenberger v. Pennsylvania*, 171 U. S. 1, 13, 43 L. ed. 49, 18 Sup. Ct. 757; *Hennington v. Georgia*, 163 U. S. 299, 313, 41 L. ed. 166, 16 Sup. Ct. 1086; *Louisville & Nashville Rd. Co. v. Kentucky*, 161 U. S. 677, 700, 40 L. ed. 849, 16 Sup. Ct. 714; *Plumley v. Massachusetts*, 155 U. S. 461, 468, 39 L. ed. 223, 15 Sup. Ct. 154; *Brennan v. Titusville*, 153 U. S. 289, 300, 14 Sup. Ct. 829, 38 L. ed. 719; *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. ed. 385; *Minnesota v. Barber*, 136 U. S. 313, 324, 34 L. ed. 455, 10 Sup. Ct. 862; *Leisy v. Hardin*, 135 U. S. 100, 120, 153, 10 Sup. Ct. 681, 34 L. ed. 128; *Bowman v. Chicago &*

But until Congress acts upon the subject a State may in the exercise of its police power enact laws for the inspection of cattle coming from other States.⁸¹ So a State may establish a system of quarantine laws for the protection of health, even though some of the rules may amount to a regulation of commerce, provided that Congress has not acted in the matter by covering the same ground or by forbidding State laws.⁸² And a State or Territory has the right to legislate for the safety and welfare of its people, which is not taken from it because of the exclusive right of Congress to regulate interstate commerce; and an inspection law affecting interstate commerce is not for that reason invalid unless it is in conflict with an Act of Congress or is an attempt to regulate interstate commerce. So a law of a Territory⁸³ making it an offense for any railroad company to receive for shipment beyond the limits of the Territory, hides, which had not been inspected as required by the law is not unconstitutional as an unwarranted regulation of, or burden on, interstate commerce. The law being otherwise valid the amount of an inspection fee is not a judicial question; it rests with the legislature to fix the amount, and will only present a valid objection if so unreasonable and disproportionate to the services rendered as to attack the good faith of the law. It was also held, concerning the above stated law, that the court would take judicial notice of the fact that cattle run at large in the great stretches of country in the West, identified only as to ownership by brands, and of the necessity for, and use of, branding of such cattle, and that it would not strike down State or territorial legislation, essential for prevention of crime, requiring the inspection of hides to be shipped without

Northwestern Ry. Co., 125 U. S. 465, 491, 492, 513, 31 L. ed. 700, 8 Sup. Ct. 689, 1062; *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, 345, 30 L. ed. 1200, 7 Sup. Ct. 1118; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 662, 29 L. ed. 516, 6 Sup. Ct. 252; *Brown v. Houston*, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. ed. 257.

⁸¹ *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. 485.

⁸² *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. 1114. *Examine Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. 671, aff'g 155 Fed. 428.

⁸³ Act of New Mexico of March 19, 1901.

the State, although the statute did not require such inspection of hides not to be so shipped. It was also decided that the provision in § 10, Art. I, of the Constitution of the United States that States shall not lay imposts and duties on imports and exports was not contravened by a State inspection law applicable only to goods shipped to other States, and not to goods shipped directly to foreign countries.⁸⁴

§ 59. Same Subject.

While in a proper case Federal authorities may adopt a quarantine line adopted by a State, where the Secretary makes regulations adopting it as applying to all commerce whether interstate or intrastate, and nothing on the face of the order indicates whether he would have made such an order if limited to interstate commerce, the order is not divisible, and the court cannot declare that it relates solely to interstate commerce but must declare it void as an entirety.⁸⁵ Again, the rule that State inspection laws, which do not provide adequate inspection and impose a burden beyond the cost of inspection, are repugnant to the commerce clause of the Constitution, does not apply to liquors after they have ceased to be articles of interstate commerce under the provisions of the Wilson Act.⁸⁶ But a State law requiring the inspection of meats and the payment by the owner thereof of a certain per cent to the inspector for his compensation is void as being in restraint of interstate commerce and as imposing a discriminating tax upon the products and industries of some States in favor of those of another. The principle is also applicable, in such a case, that a State enactment is void, if, by its necessary operation, it destroys rights granted or secured by the Constitution of the United States.⁸⁷ A State statute providing for the

■ *McLean v. Denver & Rio Grande R. Co.*, 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. 1, *aff'g* 78 Pac. 74.

■ *Illinois Central Rd. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. 153.

■ *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. ed. 925, 25 Sup. Ct. 552.

■ *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 11 Sup. Ct. 213.

inspection of oil is not an unconstitutional burden on interstate commerce as applied to oil coming from other States but meanwhile stored in the State enacting the statute for convenience of distribution and for reshipping from tank cars and barreling.⁸⁸ A State may require all logs running out of a boom, chartered or to be chartered, to be surveyed, inspected and sealed, and improvements made in a navigable river by the construction of the boom and its works, and the exaction of reasonable charges for the use of such works, including fees of State officials for inspecting and sealing, cannot, when done under State authority be considered in any just sense a burden upon interstate commerce.⁸⁹

§ 60. Interstate Commerce—Taxation—Generally.⁹⁰

Interstate commerce by corporations is entitled to the same protection against State exactions which is given to such commerce when carried on by individuals.⁹¹ Interstate commerce cannot be taxed at all by a State, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.⁹² Again, the following propositions as to the taxation by States and their municipalities or corporations engaged in carrying on interstate commerce have been settled; the Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects are national in their character, or admit of only one uniform system or plan of regulation. No State can compel a

⁸⁸ *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. 475; *Tenn. act of 1899*, chap. 349, pp. 811, 814. See *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. ed. 394.

⁸⁹ *Lindsay & Phelps Co. v. Mullen*, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. ed. 400.

⁹⁰ As to taxation, see also §§ 67 *et seq.*, herein.

⁹¹ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158.

Taxation of Franchises, see *Joyce on Franchises*, §§ 417-461.

⁹² *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, 7 Sup. Ct. 592.

party individual or corporation, to pay for the privilege of engaging in interstate commerce. This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, providing at least the franchise is not derived from the United States. No corporation, even though engaged in interstate commerce, can appropriate to its own use property public or private, without liability to a charge therefor.⁸³ A State may also impose upon a consolidated company composed of several foreign corporations a charge of a percentage upon its entire authorized stock as a fee to the State for filing the articles of consolidation in the office of the Secretary of State without which filing it could not possess the powers, immunities and privileges of a corporation in such State, and such charge is not a tax on interstate commerce, or the right to carry on the same, or the instruments thereof; and its enforcement involves no attempt on the part of the State to extend its taxing power beyond its territorial limits.⁸⁴ The protection of the commerce clause of the Federal Constitution is not, however, available to defeat a State stamp tax law on transactions wholly within a State because they affect property without that State, or because one or both of the parties previously came from other States.⁸⁵

§ 61. Interstate Commerce — Taxation — Carriers — Express Companies — Vessels — Railroads — Telegraph Companies.⁸⁶

Although, as above stated, it is well settled that no State can interfere with interstate commerce through the imposition

⁸³ *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. 817, citing *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492, 30 L. ed. 694, 7 Sup. Ct. 592.

⁸⁴ *Ashley v. Ryan*, 153 U. S. 436, 17 Sup. Ct. 865, 38 L. ed. 773.

⁸⁵ *Hatch v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. 188, aff'g 184 N. Y. 431.

⁸⁶ As to taxation, see also §§ 67 *et seq.*, herein.

of a tax which is, in effect, a tax for the privilege of transacting such commerce, still such restriction upon the power of a State does not in the least degree abridge its right to tax at their full value all the instrumentalities used for such commerce. The capital stock of a corporation and the shares in a joint-stock company represent not only its tangible property, but also its intangible property, including therein all corporate franchises and all contracts, privileges and good will of the concern; and when, as in the case of an express company, the tangible property of the corporation is scattered through different States by means of which its business is transacted in each, the situs of this tangible property is not simply where its home office is, but is distributed wherever its tangible property is located and its work is done. So it is declared in this connection that no fine-spun theories about situs should interfere to enable these large corporations, whose business is of necessity carried on through many States, from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires.⁹⁷ It is further decided that although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to State taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. The property of corporations engaged in interstate commerce, situated in the several States through which their lines or business extends, may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put and all the elements making up the aggregate value; and a proportion of the whole fairly and properly ascertained may be taxed by the particular State, without violating any Federal restriction. While there is an undoubted distinction between

⁹⁷ *Adams Express Co. v. Ohio*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. 604.

the property of railroad and telegraph companies and that of express companies, there is the same unity in the use of the entire property for the specific purposes, and there are the same elements of value, arising from such use. The classification of express companies with railroad and telegraph companies, as subject to the unit rule, does not deny the equal protection of the laws; as that provision in the Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, and was not intended to compel a State to adopt an iron rule of equal taxation.⁹⁸ Nor is the general rule that tangible personal property is subject to taxation by the State in which it is, no matter where the domicile of the owner may be, affected by the fact that the property is employed in interstate transportation on either land or water. Vessels registered or enrolled are not exempt from ordinary rules respecting taxation of personal property. The artificial situs created as the home port of a vessel, under § 4141, Rev. Stat., only controls the place of taxation in the absence of an actual situs elsewhere. Vessels, though engaged in interstate commerce, employed in such commerce wholly within the limits of a State, are subject to taxation in that State although they may have been registered or enrolled at a port outside its limits.⁹⁹ So the business of receiving and landing of passengers and freight is incident to their transportation, and a tax upon such receiving and landing is a tax upon transportation and upon commerce, interstate or foreign, involved in such transportation. The only interference by a State with the landing and receiving of passengers or freight arriving by vessels from another State or from a foreign country which is permissible, is confined to measures to prevent confusion among the vessels, and collisions between them, to insure their safety and convenience, and to facilitate

⁹⁸ *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. ed. 663. Case followed in *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. ed. 960; *Adams Express Co. v. Indiana*, 165 U. S. 255, 41 L. ed. 707, 17 Sup. Ct. 901.

⁹⁹ *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. 66, 49 L. ed. 1059.

the discharge or receipt of their passengers or freight. Freedom of transportation between the States, or between the United States and foreign countries, implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property.¹ A State statute, however, which levies a tax upon the gross receipts of railroads for the carriage of freight and passengers, into, out of, or through the State is a tax upon commerce among the States and is, therefore, void. While a State may tax the money actually within the State, after it has passed beyond the stage of compensation for carrying persons or property, as it may tax other money or property within its limits, a tax upon receipts for this class of carriage specifically is a tax upon the commerce out of which it arises, and, if that be interstate commerce, it is void under the Constitution. The States cannot be permitted, under the guise of a tax upon business transacted within their borders, to impose a burden upon commerce among the States, when the business so taxed is itself interstate commerce.² So a State statute imposing a tax upon railroad companies equal to one per cent of their gross receipts is, as to those companies whose receipts include receipts from interstate business a burden on interstate commerce and as such violative of the commerce clause of the Constitution.³

¹ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158. See *Henderson v. New York*, 92 U. S. 259, 23 L. ed. 543 [criticising *Passenger Cases*, 7 How. (48 U. S.) 283, 12 L. ed. 702; *New York v. Miln*, 11 Pet. (36 U. S.) 102, 9 L. ed. 648]; *State Freight Tax Case*, 15 Wall. (82 U. S.) 232, 21 L. ed. 146. Compare *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. 247, where act of Congress imposing a charge upon every passenger not a citizen of this country was held a valid exercise of its power to regulate commerce.

² *Fargo v. Michigan*, 121 U. S. 230, 30 L. ed. 888, 7 Sup. Ct. 857.

³ *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. 638, rev'g 97 S. W. 71, following *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. 1118, distinguishing *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 35 L. ed. 994, 12 Sup. Ct. 121, 163, and held that the latter case does not overrule the former.

A single tax, assessed under the laws of a State upon receipts of a telegraph company which were partly derived from interstate commerce and partly from commerce within the State, and which were capable of separation but were returned and assessed in gross and without separation or apportionment, is invalid in proportion to the extent that such receipts were derived from interstate commerce, but is otherwise valid; and while a Circuit Court of the United States should enjoin the collection of the tax upon the portion of the receipts derived from interstate commerce, it should not interfere with those derived from commerce entirely within the State.⁴

§ 62. Interstate Commerce—Taxation—Railroads Continued—Other Property.⁵

While a State cannot impose a tax on the movement or transportation of persons or property from one State to another and such a tax is an interference with and a regulation of commerce between the States, beyond the power of the State to impose,⁶ still a State tax against a railroad corporation, incorporated under its laws, on account of transportation done by it from one point within the State to another point within it, but passing during the transportation without the State and through part of another State, is not a tax upon interstate commerce, and does not infringe the provisions of the Constitution of the United States.⁷ So a statute of a State, imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the State, under which a corporation of another State, engaged in running railroad cars into, through and out of the State, and having at all times a large number of such cars within the State, is taxed

⁴ *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 32 L. ed. 229, 8 Sup. Ct. 1127. (The decisions of this court respecting the taxation of telegraph companies reviewed in this case.) See Joyce on Electric Law (2d ed.), §§ 83a-113a, 911-940b.

⁵ As to taxation, see also §§ 67 et seq., herein.

⁶ *Railroad Co. v. Maryland*, 21 Wall. (88 U. S.) 456, 22 L. ed. 678.

⁷ *Lehigh Valley R. R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 12 Sup. Ct. 806, 45 Atl. L. J. 511, 11 Ry. & Corp. L. J. 302.

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by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in this and other States over which its cars are run, does not, as applied to such a corporation, violate the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States.⁸ Again, a State statute which requires every corporation, person or association operating a railroad within the State to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provides that, when applied to a railroad lying partly within and partly without the State, or to one operated as a part of a line or system extending beyond the State, the tax shall be equal to the proportion of the gross receipts in the State, to be ascertained in the manner provided by the statute, does not conflict with the Constitution of the United States; and the tax thereby imposed upon a foreign corporation, operating a line of railway, partly within and partly without the State, is one within the power of the State to levy.⁹

§ 63. **Same Subject—Property Left Temporarily in State.**¹⁰

Another factor of importance is that merchandise may cease to be interstate commerce at an intermediate point between the place of shipment and ultimate destination; and if kept at such point for the use and profit of the owners and under the protection of the laws of the State, it becomes subject to the taxing and police power of the State.¹¹ So there may be an interior movement of property through the State which does not constitute interstate commerce even though the property

⁸ *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 11 Sup. Ct. 876, followed in *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 35 L. ed. 621, 11 Sup. Ct. 883.

⁹ *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 35 L. ed. 994, 12 Sup. Ct. 121, 163, 11 Ry. & Corp. L. J. 52, 48 Am. & Eng. R. Cas. 602.

¹⁰ As to taxation, see also §§ 66 *et seq.*, herein.

¹¹ *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. 475.

come from or be destined to another State there to be transported by railroad, so that logs left in a sorting boom or gap after those intended to be actually used are taken away are not property engaged in interstate commerce so as to be exempt from taxation in the State where located.¹² But sheep driven through a State from a point without to another point without such State for the purpose of being shipped by rail from the latter point is property engaged in interstate commerce to such an extent as to be exempt from taxation by the State through which they are driven.¹³ Again, while a State may tax property which has moved in the channels of interstate commerce after it is at rest within the State and has become commingled with the mass of property therein, it may not discriminate against such property by imposing upon it a burden of taxation greater than that imposed upon similar domestic property.¹⁴

§ 64. Interstate Commerce—Taxation of Bridges and Bridge Companies.¹⁵

A tax on the capital stock of an interstate bridge, which is not a tax on franchises conferred by the Federal Government, but on those conferred by the State, is not a tax on interstate commerce.¹⁶ So a railroad bridge across a navigable river forming the boundary line between two States is not by reason of being an instrument of interstate commerce exempt from taxation by either State upon the part within it.¹⁷ And a tax

¹² *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. ed. 394, following *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. 475.

¹³ *Kelley v. Rhodes*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. 259. Distinguishing *Pittsburg & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. ed. 538; *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. 1091.

¹⁴ *Darnell & Son Co. v. Memphis*, 208 U. S. 113, 28 Sup. Ct. 247, 52 L. ed. 413.

¹⁵ As to taxation, see also §§ 67 *et seq.*, herein.

¹⁶ *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. 205.

¹⁷ *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Board Public Works West Virginia*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. 90. See Hen-

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is not one on interstate business carried on, over, or by means of an interstate bridge, where the company does not transact such business but it is carried on by the persons and corporations which pay the company tolls for the privilege of using such bridge; and the fact that the tax may to some extent be affected by, and might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted.¹⁸

derson Bridge Co. v. Henderson City, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. 114.

¹⁸ Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. 532.

CHAPTER VI

CONSTITUTIONAL BASIS OF ACTIONS AND DEFENSES—FEDERAL AGENCIES—TAXATION ¹

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| <p>§ 65. Instrumentalities of Federal Government—Federal and State Control — National Banks.</p> <p>66. Same Subject.</p> <p>67. Taxation—Power of States—Generally.</p> <p>68. Taxation—Obligation of Contract—Equal Protection of Law—Due Process of Law.</p> <p>69. Taxation — Exemptions — Instrumentalities of Federal Government — State Agencies.</p> <p>70. Taxation—Instrumentalities of Federal Government—Qualification or Limitation of Doctrine of Exemption.</p> <p>71. Taxation—National Banks.</p> <p>72. Taxation — Savings Banks — Obligations, Securities,</p> | <p>Bonds, Stocks, Notes, etc., of United States.</p> <p>§ 73. Same Subject.</p> <p>74. Same Subject—When Tax Is on Franchise.</p> <p>75. Taxation—Franchises or Privileges Conferred by Congress — Railroads — Telegraph Companies.</p> <p>76. Taxation—Railroads.</p> <p>77. Taxation—Franchises—Capital Stock.</p> <p>78. Taxation — “Franchise” — “Corporate Franchise” — Bridge Companies — Insurance Companies—Uniformity of Taxation.</p> <p>79. Exemption from Taxation—Power of State as to—Effect of Consolidation, etc.</p> |
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§ 65. Instrumentalities of Federal Government—Federal and State Control—National Banks.

In 1875 the Federal Supreme Court held that national banks which are organized under and brought into existence by an act of Congress,² which body is the sole judge of the necessity for their creation, are the instruments designed to be used to aid the Government in the administration of an important

¹ See § 1, herein.

As to interstate commerce and taxation, see §§ 60–64, herein.

² Act of June 3, 1864, chap. 106, 13 Stat. 99, 100, 18 Stat. 123; Rev. Stat. U. S., §§ 5133–5243; Comp. Stat. U. S., 1901, pp. 3454 *et seq.*; Comp. Stat. U. S., 1907, p. 1035.

branch of the public service, and the States can exercise no control over them, nor in anywise affect their operation, except so far as Congress may see proper to permit.³ In *Waite v. Dowley*,⁴ a case as to the validity of a State statute relating to the taxation of stockholders, decided in 1876, Mr. Justice Miller said: "The proposition on which this statute is asserted to be void is that Congress has legislated upon the same subject, and that, where there exists a concurrent right of legislation in the States and in Congress, and the latter has exercised its power, there remains in the States no authority to legislate on the same matter. It is not necessary to dispute that proposition, nor, when stated in this general language, can it be controverted. It is none the less true, however, that the line which divides what is occupied exclusively by any legislation of Congress from what is left open for the action of the States is not always well defined, and is often distinguished by such nice shades of differences on each side as to require the closest scrutiny when the principle is invoked, as it is in this case. We have more than once held in this court that the national banks organized under the acts of Congress are subject to State legislation, except when such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation." In *Davis v. Elmira Savings Bank*,⁵ a case decided in 1895, it was held that a State law which provides for the payment by the receiver of an insolvent bank, in the first place, of deposits in the bank by savings banks, when applied to an insolvent national bank, is in conflict with a statute⁶ of the United States, directing the Comptroller of the Currency to make ratable dividends of the money paid over to him by such receiver, on all claims proved to his satisfaction, or

³ *Farmers' & Mechanics' Nat. Bk. v. Dearing*, 91 U. S. 29, 23 L. ed. 196.

⁴ 94 U. S. 527, 533, 24 L. ed. 181.

⁵ 161 U. S. 275, 283, 40 L. ed. 700, 16 Sup. Ct. 502.

⁶ Rev. Stat. U. S., § 5236; Comp. Stat. U. S., 1901, p. 3508; see *Scott & Beamen's Index Analyses of Fed. Stat.*, title Nat. Bks.

adjudicated in a court of competent jurisdiction, and is therefore void when attempted to be applied to a national bank. It was declared by Mr. Justice White in this case that national banks are instrumentalities of the Federal Government created for a public purpose, and as such subject to the paramount authority of the United States. It follows that an attempt by the State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge their duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of the Federal Supreme Court.⁷

§ 66. Same Subject.

It was held, in 1896, that State statutes invalidating preferences made by insolvent debtors and assignments or transfers made in contemplation of insolvency, do not conflict with the provisions of the Revised Statutes of the United States⁸ relating to national banks and to mortgages of real estate made to them in good faith by way of security for debts previously contracted, and are valid when applied to claims of such banks against insolvent debtors. It was further decided in the same case that it is only when a State law incapacitates a national bank from discharging its duties to the Government that it becomes unconstitutional. This proposition is harmonious with the proposition that national banks are instrumentalities of the Federal Government, created for a public purpose, and

⁷ *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283, 40 L. ed. 700, 16 Sup. Ct. 502, per Mr. Justice White, quoted from in *Easton v. Iowa*, 188 U. S. 220, 238, 47 L. ed. 452, 23 Sup. Ct. 288, per Mr. Justice Shiras, restated in *McClellan v. Chipman*, 164 U. S. 347, 357, 41 L. ed. 461, 17 Sup. Ct. 85. Principal case is affirmed as to the first part of the above proposition in *McClellan v. Chipman*, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. 85.

⁸ *Rev. Stat. U. S.*, §§ 5136, 5137; *Comp. Stat. U. S.*, 1901, pp. 3455 *et seq.*; *Comp. Stat. U. S.*, 1907, p. 1035. See 1 *Scott & Beamen's Index Analyses of Fed. Stat.*, under title, Banks, also National Banks.

as such necessarily subject to the paramount authority of the United States.⁹ Again, in 1902 it was held that it rests upon principle and authority that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon them, and has the sole power to regulate and control the exercise of their operations. State legislatures are, therefore, precluded from interfering, whether with friendly or hostile intentions, with such banks or their officers in the exercise of the powers conferred upon them by the General Government. This rule especially applies where Congress has acted expressly in exercising its powers of control and supervision over national banks for the protection of creditors and has vested the power of control and visitation over them in Federal officers. It was also decided in the same case that while a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction, and it may declare, by special laws, certain acts to be criminal offenses when committed by officers and agents of its own banks and institutions, it is without lawful power to make such special laws applicable to banks organized and operated under the laws of the United States.¹⁰ This last case is cited to the first point in a case decided in 1905 which holds that although in a limited sense there is an element of contract in becoming a shareholder of a national bank, the liability for debts of the institution is not contractual but is based upon the provisions to that effect in the national banking law. The Government creating the bank has prescribed the terms upon which ownership of its shares can be acquired, and only those are exempted from liability who are specially described in the statute; nor can any shareholders be exempted from such liability by a State statute.¹¹ It was again decided in 1905 that States have no power to enact legislation con-

⁹ *McClellan v. Chipman*, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. 85, aff'g on the first point, *National Bank v. Commonwealth*, 9 Wall. (76 U. S.) 353, 19 L. ed. 701; aff'g on the second point *Davis v. Elmira Savings Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. 502.

¹⁰ *Easton v. Iowa*, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. ed. 252.

¹¹ *Christopher v. Norvell*, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. 495.

travelling Federal laws for the control of national banks.¹² No loss of the entire debt is incurred by a national bank, as a penalty or otherwise, by reason of the provisions of the usury law of a State, where the only forfeiture provided by an act of Congress¹³ is of the entire interest which the note, bill, or other evidence of debt, carries with it, when the rate knowingly received or charged by such bank is in excess of that allowed by such enactment.¹⁴ But §§ 3411 and 5214 of the Revised Statutes, cannot be so construed together, and effect given to both, as to leave a national bank liable to the duty imposed by § 5214 and yet entitle it to the exemption provided by § 3411 under the contingency stated therein. The provisions of this latter section, exempting banks from taxation on circulation, does not relate to national banks but to State banks only. One of the public policies of the National Bank Act was to secure the public credit and encourage the issue of notes to circulate as currency founded upon United States bonds, and § 3411 will not be construed as intending to exempt those national banks that allowed their circulation to fall below five per cent of their capital stock from the taxation provided by § 5214 to create a fund to bear the burden common to all national banks for engraving and printing the notes.¹⁵

§ 67. Taxation—Power of States—Generally.

In distributing the power of taxation the Constitution retained to the States the absolute power of direct taxation, but granted to the Federal Government the power of the same taxation upon condition that, in its exercise, such taxes should be apportioned among the several States according to numbers; and this was done, in order to protect to the States, who were surrendering to the Federal Government so many sources

¹² *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. 4.

¹³ *Act of June 3, 1864*, chap. 106, 13 Stat. 99, 100, 18 Stat. 123; *Rev. Stat. U. S.*, §§ 5133–5243; *Comp. Stat. U. S.*, 1901, pp. 3454 *et seq.*; *Comp. Stat. U. S.*, 1907, p. 1035.

¹⁴ *Farmers' & Mechanics' Nat. Bk. v. Dearing*, 91 U. S. 29, 23 L. ed. 196.

¹⁵ *Merchants' National Bk. v. United States*, 214 U. S. 33, 53 L. ed. 899, 29 Sup. Ct. 593, *aff'g* 42 Ct. Cl. 6.

of income, the power of direct taxation, which was their principal remaining resource.¹⁶ Presumptively all property within the territorial limits of a State is subject to its taxing power, and the burden of proof is on one claiming that any particular property is by contract or otherwise beyond the reach thereof.¹⁷

The power of legislation, and consequently, of taxation, operates on all the persons and property belonging to the body politic; this is an original principle, which has its foundation in society itself; it is granted by all, for the benefit of all; it resides in government, as a part of itself; and need not be reserved, where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies.¹⁸ Owing, however, to the conditions of modern business a large proportion of valuable property is now found in intangible things, such as franchises, and these are, like other property, subject to taxation.¹⁹ And it is not beyond the power of a State, so far as the Federal Constitution is concerned, to tax the franchise of a corporation at a different rate from the tangible property in the State.²⁰

The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. A tax upon a corporation may be proportioned to the income received as well as to the franchise granted or the property possessed. The fact that taxation increases the expenses attendant upon the use or possession of the thing taxed, of itself constitutes no objection to its constitutionality. The exercise of the authority which every

¹⁶ *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. 912. See s. c., 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. 673.

¹⁷ *Metropolitan St. Ry. Co. v. New York State Board of Tax Comm'rs*, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 23.

¹⁸ *Providence Bank v. Billings*, 4 Pet. (29 U. S.) 514, 8 L. ed. 939.

¹⁹ *Metropolitan St. Ry. Co. v. New York State Board of Tax Comm'rs*, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 23.

²⁰ *Coulter v. Louisville & N. Rd. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. ed. 615.

State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports or tonnages or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress.²¹ Before a special assessment, levied by legislative authority of a State, as in case of a provision for back taxes in a State, can be actually enforced, or during the process of its enforcement, the taxpayer must have an opportunity to be heard as to its validity and extent; but this rule is met where the State Court has afforded the taxpayer full opportunity to be heard on both of those questions, and after such opportunity has rendered a judgment providing for the enforcement of such amount of the tax as it finds actually due. In so determining the amount due and reducing the amount assessed the State Court does not assume the legislative function of making an assessment, made by the assessor under color of legislative authority.²²

The mere lack of a provision in a tax law for notice does not take away the jurisdiction of the taxing officer to make an assessment under any circumstances. If the tax could be imposed for a certain amount it is not void, but at most voidable for the illegal amount, if any.²³ If a State has not the power to levy a tax it will not be sustained merely because another tax which it might lawfully impose would have the same ultimate incidence.²⁴

§ 68. Taxation—Obligation of Contract—Equal Protection of Law—Due Process of Law.

A State taxing law may be operative as to a savings bank and

²¹ *Delaware Railroad Tax*, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

²² *Security Trust Co. v. Lexington*, 203 U. S. 323, 27 Sup. Ct. 87, 51 L. ed. 204.

²³ *People's Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. ed. 180.

²⁴ *Home Savings Bank v. Des Moines*, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. 571.

not violate the contract clause of the Federal Constitution where such bank is unprotected by the creation of an irrevocable contract on the part of the State.²⁵ A bank charter may limit the amount of tax on shares of stock in stockholders' hands so that any subsequent imposition of an additional tax will impair the obligation of contract and be void.²⁶ Where the charter of a bank, granted by the legislature of Tennessee, provided, that the bank "shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes," it was held (1) That this provision was a contract between the State and the bank, limiting the amount of tax on each share of the stock. (2) That a subsequent revenue law of the State, imposing an additional tax on the shares in the hands of stockholders, impaired the obligation of that contract, and was void.²⁷ The mere grant for a designated time of an immunity from taxation does not take it out of the rule subjecting such grant to the general law retaining the power to amend or repeal, unless the granting act contains an express provision to that effect.²⁸ A tax of two cents a share imposed on transfers of stock, made within a State by a tax law does not violate the equal protection clause of the Fourteenth Amendment as an arbitrary discrimination because only imposed upon transfers of stock, or because based on par, and not market value; nor does it deprive non-

²⁵ *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. 530, 571. In this case the act of Ky. of Feb. 14, 1856, and the act of May 12, 1884, chap. 1412, incorporating the Savings Bank and the act of May 17, 1886, known as the Hewitt Act and other statutes were held not to create an irrevocable contract and that the Kentucky taxing law of Nov. 11, 1892, chap. 108, did not violate such obligation clause. See *Kentucky Bank Cases*, 174 U. S. 408, 43 L. ed. 1027, 19 Sup. Ct. 880 (there were twenty-six of these cases—five decided in 1899—five affirmed by a divided court in 1899).

²⁶ *Bank of Commerce v. Tennessee*, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. ed. 645.

²⁷ *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558.

²⁸ *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. 530, 571. See *Kentucky Bank Cases*, 174 U. S. 408, 43 L. ed. 1027, 19 Sup. Ct. 880 (there were twenty-six of these cases—five decided in 1899 and five affirmed by a divided court in 1899). *Examine Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. ed. 346, 42 Sup. Ct. 181.

resident owners of stock transferring in the State of such statutory enactment, shares of nonresident corporations of their property without due process of law; nor is it as to such transfers of stock an interference with interstate commerce.²⁹ Where a State law for the valuation of property and the assessment of taxes thereon, provides for the classification of property subject to its provisions into different classes, and makes for one class one set of provisions as to modes and methods of ascertaining the value, and as to right of appeal, and different provisions for another class as to those subjects, but which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, it denies to no person affected by it "equal protection of the laws," within the meaning of the Fourteenth Amendment to the Constitution of the United States.³⁰

A State statute for raising public revenue by the assessment and collection of taxes, which gives notice of the proposed assessment to an owner of property to be affected, by requiring him at a time named to present a statement of his property, with his estimate of its value, to a designated official charged with the duty of receiving the statement; which fixes time and place for public sessions of other officials, at which this statement and estimate are to be considered, where the official valuation is to be made, and when and where the party interested has the right to be present and to be heard; and which affords him opportunity, in a suit at law, for the collection of the tax, to judicially contest the validity of the proceeding, does not necessarily deprive him of his property "without due process of law," within the meaning of the Fourteenth Amendment to the Constitution of the United States.³¹ The power of

²⁹ *Hatch v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. 188, aff'g 194 N. Y. 431.

³⁰ *Kentucky Railroad Tax Cases* (Cincinnati, New Orleans & Texas Pac. Rd. Co. v. Kentucky), 105 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. 57.

³¹ *Kentucky Railroad Tax Cases* (Cincinnati, New Orleans & Texas Pac. Rd. Co. v. Kentucky), 105 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. 57.
Tax law of New York imposing taxes on certain public franchises held not

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taxation conferred by law enters into the obligation of a contract, and subsequent legislation withdrawing or lessening such power and which leaves creditors without adequate means of satisfaction impairs the obligation of their contracts.³² Other decisions as to taxation and the obligation of contract, equal protection of the laws and due process of law clauses appear under the next following sections.

§ 69. Taxation—Exemptions—Instrumentalities of Federal Government—State Agencies.

The State governments have no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers; nor have they any power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the National Government. A tax therefore on the operation of an instrument, such as a branch of a bank incorporated by an act of Congress, employed by the Government of the United States to carry its powers into execution is unconstitutional. The above principle does not extend to a tax paid by the real property of such bank, in common with other real property in a particular State, nor to a tax imposed upon the proprietary interest which the citizens in that State may hold in that institution in common with other property of the same description throughout the State.³³ This doctrine is substantially reasserted in a case which holds that although all subjects over which the power of a State extends are, as a general rule, proper subjects of taxation, yet the power of a State to tax does not extend to those means which are employed by Congress

repugnant, with respect to the case before it, to the equal protection, due process, or impairment of obligation of clauses of the Federal Constitution and of the Fourteenth Amendment thereto. *Metropolitan St. Ry. Co. v. New York State Board of Tax Comm'rs*, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 23.

³² *Hubert v. New Orleans*, 215 U. S. 170, 54 L. ed. —, 30 Sup. Ct. —, rev'g 119 La. 623.

³³ *McCulloch v. Maryland*, 4 Wheat. (17 U. S.) 316, 436, 4 L. ed. 579.

to carry into execution the powers conferred in the Federal Constitution. "Unquestionably the taxing power of the States is very comprehensive, but it is not without its limits. State tax laws cannot restrain the action of the national government, nor can they abridge the operation of any law which Congress may constitutionally pass. They may extend to every object of value within the sovereignty of the State, but they cannot reach the administration of justice in the Federal Courts, nor the collection of public revenue, nor interfere with any constitutional regulation of Congress.³⁴ The true reason for the rule is that the Constitution of the United States and the laws of Congress made in pursuance thereof are the supreme law of the land, and the express provision is that the judges in every State Court shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."³⁵

The exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business, such as the control of the sale of intoxicating liquors by the dispensary system.³⁶ And the principle that the States cannot tax official agencies of the Federal Government does not apply to obligations such as checks and warrants available for immediate use. A tax upon them is virtually a tax upon the money which can be drawn upon their present action.³⁷

§ 70. Taxation—Instrumentalities of Federal Government—Qualification or Limitation of Doctrine of Exemption.

The doctrine which exempts the instrumentalities of the

³⁴ Citing *Brown v. State of Maryland*, 12 Wheat. (25 U. S.) 419, 448, 6 L. ed. 678; *Weston v. City Council of Charleston*, 12 Wheat. (27 U. S.) 449, 467, 7 L. ed. 481.

³⁵ *Society for Savings v. Coite*, 6 Wall. (73 U. S.) 594, 605, 18 L. ed. 897, per Mr. Justice Clifford, citing Const., Art. VI.

³⁶ *South Carolina v. United States*, 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. 811.

³⁷ *Hibernia Savings & Loan Society v. San Francisco*, 200 U. S. 310, 50 L. ed. 495, 26 Sup. Ct. 265.

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Federal Government from the influence of State legislation, is not founded on any express provision of the Constitution, but in the implied necessity for the use of such instruments by the Federal Government. It is, therefore, limited by the principle that State legislation, which does not impair the usefulness or capability of such instruments to serve the Government, is not within the rule of prohibition.³⁸ An exemption of agencies of the Federal Government from taxation by the States is dependent, not upon the nature of the agents, nor upon the mode of their Constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of the power to serve the Government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their property merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States. A tax upon their operations being a direct obstruction to the exercise of Federal powers may not be.³⁹

§ 71. Taxation—National Banks.

A State cannot tax the banks of the United States.⁴⁰

A State is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, except when permitted so to do by the legislation of Congress. Section 5219 of the Revised Statutes is the measure of the power of States to tax national banks, their property or their franchises, that power being confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. And where the fact complained of, was of having been assessed on the franchises or intangible property of the corporation, it was held not within

³⁸ *National Bank v. Commonwealth*, 9 Wall. (76 U. S.) 353, 19 L. ed. 701.

³⁹ *Railroad Co. v. Peniston*, 18 Wall. (85 U. S.) 5, 21 L. ed. 787, followed in *Central Pac. Rd. Co. v. California*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. ed. 903.

⁴⁰ *Osborn v. United States Bank*, 9 Wheat. (22 U. S.) 738, 6 L. ed. 204.

the purview of the authority conferred by the act of Congress, and was therefore illegal.⁴¹

While a State may only tax shares of a national bank in accordance with the Federal statute, a State law, which does not give the shareholders the benefit of all deductions to which they are entitled is not necessarily void altogether, but may be sustained as to the amount properly taxable.⁴² Money invested in corporations or in industrial enterprises that carry on the business of railroads, of manufacturing enterprises, mining

⁴¹ *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. 537, cited and quoted from in *Home Savings Bank v. Des Moines*, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. 571, where the court, per Mr. Justice Moody, says: "There it appeared that a tax upon the intangible property of a national bank had been levied under the name of a franchise tax. Such a tax upon one of the agencies of the National Government is beyond the power of the State. But it was contended that although the tax was not in form upon shares in the hands of shareholders (a tax lawful by the permission Congress has given), it was the equivalent of such a tax. To this contention the court, by Mr. Justice White, replied: 'To be equivalent in law involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the State to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decision of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the name of the stockholders. * * * If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. * * * The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration.' These words apply with equal force to the case at bar."

See further as to State taxation of national banks, *Cummings v. National Bk.*, 101 U. S. 153, 25 L. ed. 903 (State Constitution; uniformity of taxation; bank shares; equalization board; unequal valuation; different classes of property; injunction); *Lionberger v. Rouse*, 9 Wall. (76 U. S.) 468, 19 L. ed. 721 (tax on shares; uniform assessment; meaning of forty-first section of National Banking Act).

⁴² *People's Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. ed.

investments and investments in mortgages, does not come into competition with the business of national banks, and is, therefore, not within the meaning of that provision of the Federal statutes,⁴³ which forbids the taxation of its shares at a greater rate than is assessed upon other moneyed capital in the hands of citizens of the State. So insurance stocks may be taxed on income instead of value, and deposits in savings banks and moneys belonging to charitable institutions may be exempted without infringing upon the above statutory provision.⁴⁴

A difference in methods of assessing shares of national banks from that of taxing State banks does not necessarily amount to a discrimination, rendering the act invalid⁴⁵ and justify the judicial interference of courts for the protection of the shareholders, unless it appears that the difference in method actually results in imposing a greater burden on the national banks than is imposed on other moneyed capital in the State.⁴⁶ A State statute may, for the purposes of taxation, require, under penalty for his neglect or refusal, the cashier of each national bank within the State to transmit, on or before a specified day in a certain month in each year, to the clerks of the several towns in the State in which any stock or shareholders of such bank shall reside, a true list of the names of such stock or shareholders on the books of such bank, together with the amount of money actually paid in on each share on the first day of the month on which said report is to be transmitted.⁴⁷

§ 72. Taxation—Savings Banks—Obligations, Securities, Bonds, Stocks, Notes, etc., of United States.

It is certain that there is a want of authority in the States

⁴³ Rev. Stat. U. S., § 5219.

⁴⁴ *Aberdeen Bank v. Chehalis Co.*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. 629, affirmed, followed and applied in *Bank of Commerce v. Seattle*, 166 U. S. 463, 42 L. ed. 1079, 17 Sup. Ct. 618.

⁴⁵ Under § 5219.

⁴⁶ *Covington v. First National Bank of Covington*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. 562.

As to taxation of national banks and shares therein, assessment and discrimination and claim of violation of rights under § 5219, U. S. Rev. Stat., see *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. ed. 1247, 22 Sup. Ct. 908.

⁴⁷ *Waite v. Dowley*, 94 U. S. 527, 33 L. ed. 181.

to tax securities of the United States issued in the exercise of the admitted power of Congress to borrow money on the credit of the United States, even though there is no express prohibition in the Constitution to that effect. Outside of those provisions, however, the power of the State to tax extends to all objects except the instruments and means of the Federal Government within the sovereign power of the State.⁴⁸ So the last clause of § 3408 of the Revised Statutes of the United States exempts savings banks of the character there mentioned from taxation of so much of their deposits as they have invested in securities of the United States, and on all sums which they have on deposit in the name of any one person, not exceeding two thousand dollars; and the act of 1879 does not change the effect of that clause.⁴⁹ A State has no power to burden, impede or in any way affect by its action the power conferred upon the Government to borrow money on the credit of the United States. It cannot by any form of taxation impose any burden upon any part of the national public debt; and it may well be doubted whether Congress has the power to confer upon the States the right to tax obligations of the United States; Congress, however, has never yet attempted to confer such a right. So a tax upon the property of a bank in which United States securities are included is beyond the power of the State, and is also within the prohibition of the acts of Congress.⁵⁰ While a tax on an individual in respect to his shares in a corporation is not a tax on the corporation, and the value of the shares may be assessed without regard to the fact that the assets of the corporation include government securities, if the tax is actually

* *Hamilton Company v. Massachusetts*, 6 Wall. (73 U. S.) 632, 639, 18 L. ed. 904, per Mr. Justice Clifford.

* *Savings Bank v. Archbold*, 104 U. S. 708, 26 L. ed. 901, § 3408, Rev. Stat. U. S., legislated in the above matter as to "associations or companies known as provident institutions, savings-banks, savings-funds, or savings-institutions, having no capital stock and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits without profit or compensation to the association or company." See Comp. Stat. U. S., 1901, p. 2247, as to what parts of this section are superseded, etc. See also Comp. Stat. U. S., 1907, p. 643.

* Rev. Stat., § 3701 and other acts.

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on the corporation although nominally on the shares such securities may not be included in assessing the value of the shares for taxation. So where the substantial effect of a State Code, providing that shares of stock of a State and savings banks and loan and trust companies shall be assessed to such banks and companies and not to the individual stockholders, and that in fixing the value of the shares, capital, surplus and undivided earnings shall be taken into account, is to tax the property of the bank and not the shares of stock, an assessment which includes government bonds owned by the bank in fixing the valuation of its shares is illegal and beyond the power of the State.⁵¹

§ 73. Same Subject.

A State statute may tax bank stocks by levying a tax on the shares of the stockholders as distinguished from the capital of the bank invested in Federal securities, even though the tax is collected from the bank instead of the individual stockholders.⁵² Again, stock of the United States is not subject to taxation under the laws of a State, and such law for that purpose is unconstitutional whether it imposes a tax *eo nomine* or includes it in the aggregate of the taxpayer's property to be valued like the rest at its worth, and that portion of the capital which a bank has invested in the stocks, bonds or other securities of the United States is not liable to taxation. A State tax on the loans of the Federal Government is a restriction upon the constitutional power of the United States to borrow money, and if the States had such a right, being in its nature unlimited, it might be used to defeat the Federal power altogether.⁵³ So a

⁵¹ *Home Savings Bank v. Des Moines*, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. 571. "This principle was announced in *Weston v. Charleston*, 2 Pet. (27 U. S.) 449, 7 L. ed. 481, where it was held that taxes upon the stock of the United States levied by one of the municipal corporations of South Carolina were invalid. From that time no one has questioned the immunity of national securities from State taxation." *Id.*, 513, per Mr. Justice Moody.

⁵² *National Bank v. Commonwealth*, 9 Wall. (76 U. S.) 353, 19 L. ed. 701.

⁵³ *Bank of Commerce v. New York*, 2 Black (67 U. S.), 620, 17 L. ed. 451.

tax laid by a State on banks on a valuation equal to the amount of their capital stock paid in, or secured to be paid in, is a tax on the property of the institution; and when that property consists of stocks of the Federal Government, the law laying the tax is void.⁵⁴ Nor can any tax be imposed by a State law or under the authority thereof upon stock issued for loans made to the United States, as such a law would be unconstitutional.⁵⁵ So under a decision rendered in 1868 United States notes issued under the Loan and Currency Acts of 1862 and 1863 intended to circulate as money and actually constituting, with the national bank notes, the ordinary circulating medium of the country, are obligations of the National Government and exempt from State taxation.⁵⁶ "The principle is, that the States cannot control the National Government within the sphere of its constitutional powers—for there it is supreme—and cannot tax its obligations for payment of money issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control."⁵⁷ Certificates of indebtedness issued by the United States to creditors of the Government for supplies furnished to it in carrying on the Civil War and by which the Government promised to pay the sums of money specified in them, with interest, at a time named are beyond the taxing power of the State.⁵⁸

§ 74. Same Subject—When Tax Is on Franchises.

A State may, however, impose by statute a tax upon the corporate franchise or business of all corporations incorporated under any law of the State, or of any other State or country, and doing business within the State, where such tax is measured by the extent of the dividends of the corporation in the current year, as the tax is one upon the right or privilege to be a corporation and to do business in the State in a corporate

⁵⁴ *Bank Tax Case*, 2 Wall. (69 U. S.) 200, 17 L. ed. 793.

⁵⁵ *Weston v. Charleston*, 2 Pet. (27 U. S.) 449, 7 L. ed. 481.

⁵⁶ *Bank v. Supervisors*, 7 Wall. (74 U. S.) 26, 19 L. ed. 60.

⁵⁷ *Banks, The, v. The Mayor*, 7 Wall. (74 U. S.) 16, 25, 19 L. ed. 57.

⁵⁸ *Banks, The, v. The Mayor*, 7 Wall. (74 U. S.) 16, 19 L. ed. 57.

capacity, and differs from a tax upon the privilege or franchise which when incorporated the company may exercise, nor does the statute being thus construed, by its imposition of a tax upon the dividends of the company, violate the provision of the act of Congress exempting bonds of the United States from taxation, although a portion of the dividends may be derived from interest on capital invested in such bonds. The validity of a State tax upon corporations created under its laws, or doing business within its territory, can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise.⁵⁹ Again, a statute of a State requiring savings societies authorized to receive deposits, but without authority to issue bills, and having no capital stock, to pay annually into the State treasury a sum equal to three-fourths of one per cent on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property, and is valid, and the fact that a franchise tax and not a tax on property has been imposed on a savings society which has invested a part of its deposits in securities of the United States, declared by Congress, in the act which authorizes their issue, to be exempt from taxation by State authority, does not exempt the society from taxation to the extent of deposits so invested.⁶⁰ So a State statute which enacts that every institution for savings, incorporated under the law of the State, shall pay to the commonwealth a tax on account of its depositors of a certain percentage on the amount of its deposits, to be assessed, one-half of said annual tax on the average amount of its deposits for six months preceding certain dates in the year, imposes a franchise tax, not a tax on property, and is valid. A savings institution, therefore, in such State, having a portion of its deposits invested in Federal securities, declared by the act of Congress authorizing their issue to be exempt from State taxation, is as liable under the above statute to a tax on account of such deposits as on account of others, and it is held that there

⁵⁹ *Home Insurance Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. 593, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. 1385.

⁶⁰ *Society for Savings v. Coite*, 6 Wall. (73 U. S.) 594, 18 L. ed. 897.

is nothing inconsistent with the view, as to the validity of the tax, in the decisions of the Federal Supreme Court.⁶¹

§ 75. Taxation—Franchises or Privileges Conferred by Congress—Railroads—Telegraph Companies.

A State board of equalization has no power to include in its assessment franchises conferred by Congress, as such franchises cannot be taxed by the State; and the assessment is repugnant to the Constitution and laws of the United States, and the power given to Congress to regulate commerce among the several States.⁶² But the fact that a railroad company is a corporation organized under a statute of the United States with power thereunder to charge and collect tolls and rates for transportation does not exempt it from the operation of a statute establishing a railroad commission as to business done wholly within the State; but such business is subject to the control of the State in all matters of taxation, rates and other police regulations.⁶³ So the property of a railroad corporation of the United States may be taxed by a State but not through its franchises.⁶⁴ Again, the privilege conferred upon telegraph companies by Congress⁶⁵ carries with it no exemption from the ordinary burdens of taxation in a State within which they may own and operate lines of telegraph, and the State may tax such company upon the property owned and used by it within its limits by what is essentially an excise tax where such tax is not forbidden by the commerce clause of the Constitution.⁶⁶ While a

⁶¹ *Provident Institution v. Massachusetts*, 6 Wall. (73 U. S.) 612, 18 L. ed. 907.

⁶² *California v. Central Pacific Rd. Co.*, 127 U. S. 1, 32 L. ed. 150, 8 Sup. Ct. 1053.

⁶³ *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. ed. 1028, affirming, following and applying in this case the facts in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047.

⁶⁴ *Central Pacific Rd. Co. v. California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. 766; *California v. Central Pacific Rd. Co.*, 127 U. S. 1, 32 L. ed. 150, 8 Sup. Ct. 1053.

⁶⁵ Under Rev. Stat., § 5263; see Joyce on Electric Law (2d ed.), §§ 51-52a.

⁶⁶ *Western Union Teleg. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct.

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State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the General Government, by the imposition of unreasonable conditions, it may subject it to a property taxation incidentally affecting its occupation in the same way that business of individuals or other corporations is affected by common governmental burdens.⁶⁷

§ 76. Taxation—Railroads.

The power of a State to construct railroads and other highways, and to impose tolls, fare, or freight for transportation thereon, is unlimited and uncontrolled. The disposition of the revenues thus derived is subject to its own discretion. But a State cannot impose a tax on the movement of persons or property from one State to another.⁶⁸ A legislative and constitutional provision of a State that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income of the several railroads, in proportion to the number of miles of railroad operated within the State, in order to meet the special service required of the State Railroad Commission.⁶⁹ So a State statute distributing for taxation purposes the rolling stock and other unlocated personal property of a railway company, to and for the benefit of the counties traversed by the railroad, does not violate the provision in the Fourteenth

961, 31 L. ed. 790. See Joyce on Electric Law (2d ed.), §§ 83a-96, 911-940b.

⁶⁷ Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 15 Sup. Ct. 360.

Consistently with the due process clause of the Fourteenth Amendment a State cannot tax property located or existing permanently beyond its limits. Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. —, 30 Sup. Ct. —. See this case *also* as to requirement which was held to impose an unconstitutional condition on Telegraph Company.

⁶⁸ Railroad Co. v. Maryland, 21 Wall. (88 U. S.) 456, 22 L. ed. 678.

When State statute taxing interstate railroads is constitutional. *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. ed. 1031.

⁶⁹ *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. 255, 48 Am. & Eng. R. Cas. 595.

Amendment to the Constitution, that no State shall deny to any person within its jurisdiction the equal protection of its laws,⁷⁰ nor is a stipulation in the charter of a railroad company, that the company shall pay to the State a bonus, or a portion of its earnings, repugnant to the Constitution of the United States. Such a stipulation is different, in principle, from the imposition of a tax on the movement or transportation of goods or persons from one State to another. The latter is an interference with and a regulation of commerce between the States, and beyond the power of the State to impose; the former is not.⁷¹ The charter of the Baltimore & Ohio Railroad Company for constructing and working a branch railroad between Baltimore and Washington contained a stipulation that the company at the end of every six months should pay to the State one-fifth of the whole amount received for the transportation of passengers. This charter was accepted and complied with for many years. It was held (1) that this stipulation was not repugnant to the Constitution of the United States; (2) that it was a contract to pay, and not a receipt of money belonging to the State; and, if unconstitutional, the objection could be set up as a defense to an action brought by the State to recover the money.⁷² The State of origin remains the permanent situs of personal property notwithstanding its occasional excursions to foreign parts, and a State may tax its own corporations for all their property in the State during the year, even if every item should be taken into another State and then brought back. The taxation, therefore, of cars under the New York franchise tax law, belonging to a corporation of that State is not unconstitutional as depriving the owner of its property without due process of law because the cars are at times temporarily absent from the State, it appearing that no cars permanently without the State are taxed.⁷³

⁷⁰ *Columbus Southern Ry. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. 296; *Ga. Stat.*, Oct. 16, 1889, *Laws of Ga.*, 1889, p. 29.

⁷¹ *Railroad Co. v. Maryland*, 21 Wall. (88 U. S.) 456, 22 L. ed. 678.

⁷² *Railroad Co. v. Maryland*, 21 Wall. (88 U. S.) 456, 22 L. ed. 678.

⁷³ *New York Central Rd. Co. v. Miller*, 202 U. S. 584, 50 L. ed. 1155, 26 Sup. Ct. 1.

§ 77. Taxation—Franchises—Capital Stock.⁷⁴

A State may tax corporations upon their franchise or business based upon the amount of capital stock employed within the State;⁷⁵ and when not otherwise exempted the capital stock of a corporation and its shares in stockholders' hands may both be taxed, and it is not double taxation.⁷⁶ So a State law requiring national banks to pay a tax which is rightfully laid on the shares of its stock is valid under the limitation of the doctrine governing the taxation of national banks by a State.⁷⁷ A State statute may also lawfully impose a franchise tax as where corporations having capital stock divided into shares are required to pay a tax of a certain percentage upon the excess of the market value of all such stock over the value of its real estate and machinery.⁷⁸ So a State statute taxing stocks of railroads incorporated in other States held by citizens of the taxing State is not unconstitutional under the Fourteenth Amendment because no similar tax is imposed on the stock of domestic railroads or of foreign railroads doing business in such taxing State; the property of the former class of railroads being untaxed, and that of the latter two classes being taxed, by the State.⁷⁹ An assessment of a tax upon the shares of stockholders in a corporation appearing upon the books of the company, which the company is required to pay irrespective of any dividends or profits payable to the shareholder, out of which it might repay itself, is substantially a tax upon the corporation itself.⁸⁰

§ 78. Taxation—"Franchise"—"Corporate Franchise"

⁷⁴ See § 72, herein.

⁷⁵ *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 345, 19 Sup. Ct. 225.

⁷⁶ *Bank of Commerce v. Tennessee*, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. ed. 645. Compare opinion of court in *Home Savings Bk. v. Des Moines*, 205 U. S. 503, 510, 51 L. ed. 901, 27 Sup. Ct. 571.

⁷⁷ *National Bank v. Commonwealth*, 9 Wall. (76 U. S.) 353, 19 L. ed. 701, *aff'd* in *McClellan v. Chipman*, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. 85.

⁷⁸ *Hamilton Company v. Massachusetts*, 6 Wall. (73 U. S.) 632, 639, 18 L. ed. 904.

⁷⁹ *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. ed. 669.

⁸⁰ *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. 198.

—Express Companies—Ferry Franchise—Bridge Companies—Insurance Companies—Uniformity of Taxation.

Although a statute may provide for a tax on the “franchise” of corporations, including certain enumerated public service corporations and those whose lines extend beyond the limits of the State, and may also use the words “corporate franchise,” nevertheless the legislative intention may, as deduced from the entire statute, be such that the scheme of taxation is not in contravention of the commerce clause and the Fourteenth Amendment, and also be in harmony, as a property tax, with the Constitution of the State enacting the statute.⁶¹ A State statute defining express companies, and prescribing the mode of taxing the same, and fixing the rate of taxation thereon, imposes a tax only on business done within the State, and does not violate the requirements of uniformity and equality of taxation prescribed by a State Constitution.⁶² Diversity of taxation both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality in taxation, and of a just adaption of property to its burdens. A system of taxation which imposes the same tax upon every species of property, irrespective of its nature, or condition or class, will be destructive of its principle of uniformity and equality of taxation, and of a just adaption of property to its burdens.⁶³ A State cannot tax a ferry franchise over a navigable river granted by another State, even though granted to a corporation of the taxing State, where the jurisdiction of the latter only extends to low water mark; such taxation would amount to a deprivation of property without due process of law.⁶⁴ But a State may tax

⁶¹ *Adams Express Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. 527; as to taxation of franchises, see *Joyce on Franchises*, §§ 417–461.

⁶² *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. 250; *Mo. Stat.*, May 16, 1889.

⁶³ *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. 250.

⁶⁴ *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. ed. 513. In this case the franchise was granted by In-

§ 79 CONSTITUTIONAL BASIS OF ACTIONS AND DEFENSES—

the intangible property within its limits of a bridge company created and organized in the State for the purpose of erecting and operating a railroad bridge over a navigable river between it and another State; and it may include the franchises it has granted in the valuation of the company's property; such a statute does not violate the Federal Constitution.⁸⁵ So a State statute, requiring insurance companies to make full and specified returns to the proper state officers of their business condition, liabilities, losses, premiums, taxes, dividends, expenses, etc., is an exercise of the police power of the State and may be enforced against a company organized under a special charter from the legislature of the State, which does not in terms require it to make such return, without thereby depriving it of any rights under the Constitution of the United States.⁸⁶

§ 79. Exemption from Taxation—Power of State as to—
Effect of Consolidation, etc.⁸⁷

It has been repeatedly held by the Federal Supreme Court that the legislature of a State may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected, and that when such immunity is conferred or such limitation is prescribed by the charter of a corporation it becomes a part of the contract, and is equally inviolate with its other stipulations; nevertheless, before any

diana to maintain a ferry across the Ohio River from the Indiana shore to the Kentucky shore. The franchise was granted to a Kentucky corporation with a franchise from that State to ferry from the Kentucky to the Indiana shore. The jurisdiction of Kentucky extended only to low water mark on the northern and western side of the Ohio River. It was held, in addition to the above, that the Indiana franchise had its situs for taxation in that State; also, *quære*, whether such taxation would burden interstate commerce, not decided.

⁸⁵ *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. 532.

⁸⁶ *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. 868.

⁸⁷ See § 23, herein.

such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed, and nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges and immunities not expressly granted are reserved.⁸⁸ A provision in a charter that certain payments shall be made out of income and that, after dividends up to a specified percentage have been paid, the balance shall be divided between the Government and the stockholders, does not, in the absence of any exemption in express terms, exempt the corporation from taxation on its franchise.⁸⁹ A provision in an act of a State legislature under which two railroads were consolidated, requiring the new company to pay annually into the State treasury a tax of a certain per cent upon its capital stock of a certain amount, was held not to prevent a subsequent legislature from imposing a further or different tax upon the company. The amount designated in such case being held to be only a declaration of the tax payable annually until a different rate should be established.⁹⁰ A consolidation of railroads operating to extinguish the old company and to form a new one as of the date of consolidation precludes an exemption from taxation in the old charter from passing to the new company.⁹¹

Immunity from taxation does not pass to purchaser of the

⁸⁸ *Delaware Railroad Tax*, 18 Wall. (85 U. S.) 206, 21 L. ed. 888. See also *Metropolitan St. Ry. Co. v. New York State Board Tax Comm'rs*, 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. 23 (case followed in *Twenty-third St. Ry. Co. v. New York State Board Tax Comm'rs*, 199 U. S. 53, 50 L. ed. 85, which also follows *Brooklyn City Rd. Co. v. New York*, 199 U. S. 48, 50 L. ed. 79, 25 Sup. Ct. 713); *Tomlinson v. Branch*, 15 Wall. (82 U. S.) 460, 21 L. ed. 189.

That exemptions from taxation are to be strictly construed, etc., see also *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 17 Sup. Ct. 230, 41 L. ed. 590; *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198.

⁸⁹ *Honolulu Rapid Transit & Land Co. v. Wilder*, 211 U. S. 137, 53 L. ed. 121, 29 L. ed. 44, aff'g 18 Hawaii, 668.

⁹⁰ *Delaware Railroad Tax*, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

⁹¹ *Keokuk & Western Rd. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. 592.

property and franchises of a railroad under a decree to enforce a statutory lien and such property is subject to taxation thereafter by the State.⁹²

⁹² *Railroad Company v. County of Hamblen*, 102 U. S. 273, 26 L. ed. 152.

Exemption from taxation and effect of consolidation, etc.; assignability; see the following cases: *Yazoo & Mississippi Valley Rd. Co. v. Vicksburg*, 209 U. S. 358, 28 Sup. Ct. 510, 52 L. ed. 833 (exemption; consolidation; application of laws affecting constituent companies and obligation of contract); *Jetton v. University of The South*, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. 375 (contract impairment clause; charter exemption not extended to lessees of corporation exempted); *Rochester Railway Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. 469, aff'g 182 N. Y. 116 (transference of legislative contract of immunity from taxation; impairment of contract; effect of merger of corporations on contract of immunity; when nontransferable); *Powers v. Detroit, Grand Haven & M. Ry. Co.*, 201 U. S. 543, 26 Sup. Ct. 556, 50 L. ed. 860, aff'g 138 Fed. 264 (reorganization of railroad company; no new corporation; statutory exemption from taxation not destroyed); *New Mexico v. United States Trust Co.*, 174 U. S. 545, 43 L. ed. 1079, 19 Sup. Ct. 784; s. c., 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. 128, 172 U. S. 186, 43 L. ed. 413, 19 Sup. Ct. 146, 881 (taxation; railroads; exemption of right of way acquired from United States; assessment of superstructures and improvements); *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. 230 (taxation; extent of exemption; railroads; assessments; local improvements); *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198 (new corporation created out of old one; exemption from legislative control, held not to pass to certain extent; tolls; taxation); *Phoenix Fire & Marine Ins. Co. v. Tennessee*, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. ed. 660 (exemption from taxation not conferred on new company beyond a defined limit which was conferred on the other company by act incorporating it); *Tennessee v. Whitworth*, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. ed. 833, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. ed. 830 (consolidation of railroads of different States; shares of new company issued for shares of old one; exemption from taxation passes into new shares in absence of statute of first State to contrary); *St. Louis, Iron Mountain & Southern Ry. Co. v. Berry*, 113 U. S. 465, 5 Sup. Ct. 529, 28 L. ed. 1055 (consolidation of railroads; exemption from taxation; new company took franchises, etc., subject to organic law as to taxation at time of consolidation); *Louisville & Nashville Rd. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. 193 (right of railroad to exemption from taxation does not pass by sale under mortgage; right personal and not assignable); *Railroad Company v. Comm'rs*, 103 U. S. 1, 26 L. ed. 359 (when exemption from taxation does not pass by grant to railroad, reaffirming *Railroad Company v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860); *Railroad Company v. Maine*, 96 U. S. 499, 24 L. ed. 836 (consolidation; tax exemption not continued); *Chesapeake & Ohio Rd. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310 (consolidation; railroads; no greater immunity from taxation acquired than severally enjoyed as to portions of

road belonging to constituent companies under their respective charters; whatever property was subject to taxation remained so after consolidation); *Central Railroad & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757 (consolidation; railroads; effect on charter exemption from taxation on each corporation); *Tomlinson v. Branch*, 15 Wall. (82 U. S.) 460, 21 L. ed. 189 (consolidation; railroads; tax exemption and extension to successor corporation; necessity of express words); *Philadelphia, W. & B. Rd. Co. v. Maryland*, 10 How. (51 U. S.) 376, 13 L. ed. 461 (consolidation; railroads; assessment of; exemption from taxation taxing power never presumed relinquished unless intention clearly expressed).

CHAPTER VII

JURISDICTION AND VENUE—DEFINITIONS

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| § 80. Definition of Jurisdiction. | § 87. Jurisdiction in "Special Cases" Defined and Construed. |
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§ 80. Definition of Jurisdiction.

Jurisdiction is the power to hear and determine a cause or matters in controversy between parties to a suit; to adjudicate or exercise any judicial power over them.¹

§ 81. Definition of Jurisdiction Continued—Nature of Corporation Cases in Which Given or Applied—Instances.

There are various other definitions of jurisdiction. Many of them have evidently been formulated with a view to the nature of the cause, the character of the judicial power to be exercised, or the particular point involved, while others have only a general application. We shall confine ourselves in the following illustrations to a statement of the nature of those corporation cases in which the word jurisdiction has been defined. The substance of the above definition has been given and applied in a suit by attachment and a claim for damages against a foreign corporation, for the negligent loss of baggage and a

¹ See notes under the two next following sections.

valise by a guest in one of its sleeping cars;² in a case of condemnation proceedings by a railway company and the jurisdiction of a justice of the peace;³ in the matter of a petition by a railroad company for appointment of commissioners of appraisal and of the insufficiency of the petition to give the court jurisdiction of the subject-matter;⁴ in an action against a State board of equalization to enjoin a certification to the State Comptroller on the assessed valuation of railroad property;⁵ in a case of certiorari to a county board of supervisors sitting as a board of equalization of taxes, under a claim that the board exceeded its jurisdiction, in that it did not regularly pursue its authority in determining the assessable value of railway property, and in that it received illegal evidence concerning profits earned by the corporation;⁶ in a cause of action

² *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 157, 82 Am. St. Rep. 68. Defined, per Tyson, J., as follows: Jurisdiction is "the power of a court or judge to hear and determine a cause. * * * It is *coram judice* when a cause is presented which brings this power into action. * * * The power to decide upon the cause of action, as presented by the pleadings, is jurisdiction, like the power to decide any other legal proposition that the case may involve." *Id.*, per Tyson, J.

³ *Musick v. Kansas City, Springfield & Memphis Ry. Co.*, 114 Mo. 309, 21 S. W. 491. *Jurisdiction of the subject-matter of a proceeding* is "the power to hear and determine cases of the general class to which the proceeding in question belongs." *Id.*

⁴ *Winnebago Furniture Mfg. Co. v. Wisconsin Midland R. Co.*, 81 Wis. 389, 393, 51 N. W. 576, quoting from the definitions of jurisdiction given in *United States v. Arredondo*, 6 Pet. (31 U. S.) 691, 709, 8 L. ed. 547; *Grignon's Lessee v. Astor*, 2 How. (43 U. S.) 319, 338, 11 L. ed. 283. See these last citations in note 12 below.

⁵ *Nashville, C. & St. L. Ry. v. Taylor*, 86 Fed. 168, 171, quoting from *Rhode Island v. Massachusetts*, 12 Pet. (37 U. S.) 657, 9 L. ed. 1233, wherein jurisdiction is defined as the power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them; quoted also in *Dahlgreen v. Superior Court*, 8 Cal. App. 622, 626, 97 Pac. 681, which also cites *People v. Sturdevant*, 9 N. Y. 263, 59 Am. Dec. 536. In the *Rhode Island v. Massachusetts* case it is also declared that: "The question is whether, in the case before a court, their action is judicial or extrajudicial or without authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree the court has jurisdiction."

⁶ *Central Pacific Rd. Co. v. Placer County*, 43 Cal. 365. Jurisdiction, generally defined, is the power to hear and determine. When the word is ap-

to enforce a mechanic's lien against mining property wherein several intervenors claimed liens upon the entire property, and one only upon a portion thereof, and an order of sale of the entire property directing a *pro rata* distribution of the proceeds among all the lienholders was held unauthorized and void;⁷ in a case of a writ of prohibition to enjoin a judge from proceeding in a cause where he had an interest therein and was disqualified, in that his property would be equally subject to injury as that of the plaintiff in an action for an injunction to restrain depositing tailings and debris from mining claims in the channel of a river;⁸ in a matter of dissolution of an insolvent bank and exclusive jurisdiction over funds of such corporation, and pendency of proceedings to dissolve as not a bar to an action by the attorney general.⁹

§ 82. Same Subject.

The substance of the above definition is also given or applied in a case of a judgment or decree as a bar, and ejectment and estoppel to set up an older grant;¹⁰ in a suit covering the

plied to a particular claim or controversy it is the power to hear and determine that controversy. *Id.*

⁷ Bassick Mining Co. v. Schoolfield, 10 Colo. 46, 14 Pac. 65, "Jurisdiction in the court" was defined as the "power to hear and determine the particular case involved. If this power to hear and determine the particular case does not exist in the court in point of law, then there can be no jurisdiction in the case. If it does exist, then, to confer actual jurisdiction of the particular case, or the subject-matter thereof, the jurisdictional power of the court must be invoked or brought into action by such measures and in such manner as is required by the local law of the tribunal. When this is done it is then *coram judice*. If this be not done, there is at least error, if not want of validity in the proceedings." *Id.*

⁸ North Bloomfield Gravel Mining Co. v. Keyser, 58 Cal. 315, defining (at p. 326) jurisdiction as the authority by which judicial officers take cognizance of and decide causes, and the power to hear and determine causes.

⁹ People v. Murray Hill Bank, 41 N. Y. Supp. 804, 805, 806, 10 App. Div. 328. (See Murray Hill Bank, In re, 43 N. Y. Supp. 836, 14 App. Div. 320, aff'd in 153 N. Y. 199, 47 N. E. 298.) "'Jurisdiction,' in the strict meaning of the term as applied to judicial officers and tribunals, means no more than the power lawfully existing to hear and determine a cause. It is the power to adjudge concerning the general questions involved." *Id.*, per Brown, P. J.

¹⁰ St. Lawrence Co. v. Holt & Matthews, 51 W. Va. 352, 364, 41 S. E. —,

points of concurrent jurisdiction nonabatement of an action by a pending action, suit against and interference with a receiver and property in his possession, authority of courts to punish summarily, and contempt;¹¹ in an action to recover damages for death caused by the negligence of a railroad company during transportation on a steam ferry;¹² and in a Georgia decision where there was also an action for the recovery of damages for homicide of the plaintiff's intestate

defining jurisdiction as the "right to adjudicate concerning the subject-matter in the given case."

¹¹ *Spinning & Brown v. Ohio Life Ins. & Trust Co.*, 2 Disney (Ohio), 336, 374, 375, where the court gives the definition in the Arredondo case (see note next following, down to and including the words "containing all the requisites, and in the manner prescribed by law"). It further defines jurisdiction as "the power to hear and determine the subject-matter in controversy. If the law confers the power to render a judgment or decree then the court has jurisdiction. What shall be adjudged or decreed between the parties is judicial action." [Quoting from *Rhode Island v. Massachusetts*, 12 Pet. (37 U. S.) 657, 718, 9 L. ed. 1233] and then concludes: "Such we understand to be the law of jurisdiction. It exists by the creation of the court, and the powers conferred upon it to hear and determine causes; but when and how the power is to be exercised depends upon the process by which parties invoke its aid."

¹² *Holmes v. Oregon & California Rd. Co.*, 9 Fed. 229, 232. In this case the court declares that: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action. If the petitioner presents such a case in his petition that, on demurrer, the court would render a judgment in his favor, it is an undoubted case of jurisdiction, whether, on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites, and in the manner prescribed by law [*United States v. Arredondo*, 6 Pet. (31 U. S.) 691, 709, 8 L. ed. 547]. Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject-matter and the parties, the question is whether, on the case before a court, their action is judicial or extrajudicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction what shall be adjudged or decreed between the parties and with which is the right of the case, is judicial action by hearing and determining it. [*Rhode Island v. Massachusetts*, 12 Pet. (37 U. S.) 654, 718, 9 L. ed. 1232; *Watkins, Ex parte*, 3 Pet. (28 U. S.) 193, 205.] It is a case of judicial cognizance, and the proceeding is judicial [*Kendall v. United States*, 12 Pet. (37 U. S.) 524, 623, 9 L. ed. 1181]," "citing *Grignon's Lessee v. Astor*, 2 How. (43 U. S.) 319, 338, 11 L. ed. 283.

brought against a railroad. A plea in abatement, on the ground of a prior action pending, was filed, and it was held that such plea, in alleging that the court in which the action was brought had "jurisdiction of the case" "under the allegations of the declaration," sufficiently averred that the court referred to had jurisdiction to entertain the action. It was further decided that whether or not the court in which such a declaration had been duly filed and served, had jurisdiction to dispose of the case upon its merits, was a question for its own determination and not for that of another court in which a second suit by the same plaintiff, against the same defendant, upon the same cause of action, was brought.¹³ So in a Federal case there was a petition by creditors to revise, in matter of law, the proceedings of the District Court, which resulted in a denial of their motion to vacate an order of adjudication of the bankruptcy of a corporation, and to permit them to file an answer and to litigate the issue whether or not the corporation was principally engaged in any pursuit which subjected it to adjudication as a bankrupt. One of the points decided was that the issue whether or not a corporation was subject to adjudication as a bankrupt was not jurisdictional. Another point determined was that while the jurisdiction of the national courts is limited, they are not inferior courts, and their judgments possess every attribute of finality and estoppel appertaining to those of courts of general jurisdiction, and the absence from their records of all appearance of jurisdictional facts is immaterial.¹⁴

¹³ *Wilson v. Atlanta, Knoxville & Northern Ry. Co.*, 115 Ga. 171, 181, 182, 41 S. E. 699. The court, per Lumpkin, J., declared that "the power to hear and determine a cause is jurisdiction" and that "any movement by a court is necessarily the exercise of its jurisdiction." "Our Civil Code, § 5094 * * * declares that to be 'a good cause of abatement' the former suit must be pending in the same or some 'other court that has jurisdiction' we may and do concede that this means jurisdiction *to entertain the case*; but the jurisdiction depends upon the plaintiff's allegations of facts and not upon the truth of those allegations."

¹⁴ *First National Bk. of Belle Fourche, In re* (U. S. C. C. A.), 152 Fed. 64, 68, 69, where the court, per Sanborn, Cir. J., defines "jurisdiction of the subject-matter and of the parties" as "the right to determine the suit or

§ 83. Same Subject.

In an Illinois case there was an action of assumpsit to recover on an insurance policy for a loss by fire and the question was in issue as to when a suit was commenced and when jurisdiction was acquired. It was declared that jurisdiction over the person was not essential to the commencement of a suit at law, but that the court must in some manner acquire jurisdiction over the person or subject-matter or both, and that suit was commenced when the *præcipe* was filed and the first summons issued by the clerk and that the policy limitation as to the time of bringing suit was not a bar, although a subsequent process was issued after the expiration of the time so limited by the policy.¹⁵ In Arkansas where an action was brought for a penalty for failure of a railroad company to signal at highway crossings there was also a question as to jurisdiction of the subject-matter and when it was acquired; it was held that when a case is colorably within the court's general jurisdiction it has jurisdiction even though the pleadings are defective, and that its judgment cannot be collaterally impeached on certiorari; also that if defendant is actually served with summons the court has jurisdiction even though the writ is defective or the service irregular.¹⁶ Other definitions have also been given and applied in corporation cases. Thus in a case in the United States Supreme Court a bill in equity was filed by a railroad company, a corporation of one State, against

proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought." This case is cited in Tully, *In re* (U. S. D. C.), 156 Fed. 634, 637, to the point that jurisdiction having been acquired, the court had a right to adjudicate upon the facts appearing, and that parties are thereby estopped from attacking the correctness of that adjudication collaterally.

¹⁵ *Schroeder v. Merchants' & Mechanics' Ins. Co.*, 104 Ill. 71, 76, defining jurisdiction as "the power to hear and determine a cause; it is *coram judice* whenever a case is presented which brings this power into action," and also that: "The *præcipe* when filed brought the power of the court into action."

¹⁶ *Railway Co. v. State*, 55 Ark. 200, 205, 17 N. W. 806, defining jurisdiction as "the right to adjudicate concerning the subject-matter in a given case."

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diction" means every kind that a court can possess, of the person, subject-matter, territory, and generally the power of the court in the discharge of its judicial duties. Its jurisdiction is coextensive with the State boundaries over every person, natural and artificial, within the same, and although the State is divided into districts the court in each district is the Supreme Court of the State and each has the same power, no more no less than the other. This power cannot be taken away in one district by the State legislature, and any such attempt so to do is unconstitutional and void.¹⁹ Where a District Court of a State is invested by its Constitution with general equity jurisdiction such jurisdiction can neither be taken away or impaired by the legislature.²⁰

§ 85. "Full Jurisdiction in all Matters of Equity" Defined.

Where a Chancery Court is given "full jurisdiction in all matters of equity," the words imply that nothing is reserved; whatever is a matter of equity, as to that, the power to adjudge is full; the court is granted capacity to fully administer it; where the court takes hold of a subject-matter it ought to dispose of it fully and finally.²¹

§ 86. Concurrent Jurisdiction Defined.

In a case of proceedings under the law of eminent domain for the condemnation of land for a railroad right of way, where there was a question of the concurrent jurisdiction of Circuit and City Courts, concurrent jurisdiction was defined as that

¹⁹ *Mussen v. Au Sable Granite Works*, 18 N. Y. Supp. 267, 268, 63 Hun, 367. In this case an action was brought to enforce a lien given by statute against certain funds in the treasury of the city of New York, alleged to be due and belonging to defendant; demurrer to jurisdiction.

²⁰ *Chicago, Burlington & Quincy Rd. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955.

²¹ *Bank of Mississippi v. Duncan*, 52 Miss. 740, a suit in chancery by creditors of a bank claiming waste and misapplication of assets; the power of equity to appoint receivers and to compel them to pay funds into court; also the power of the court to retain bill to repair wrong after it decides that it cannot grant relief and dismisses bill.

exercised by different courts at the same time over the same subject-matter, within the same territory, and wherein litigants may, in the first instance, resort to either court indifferently. And also, that it means equal power and authority with another court to hear and determine all cases of a class specified within the scope of the statute, granting such jurisdiction, which arise within the territorial limits prescribed.²²

§ 87. Jurisdiction in "Special Cases" Defined and Construed.

Where the Constitution of a State permits the legislature to confer on a County Court jurisdiction in "special cases" it is not intended thereby to include any class of cases of which the courts of general jurisdiction have always supplied a remedy, and the words must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of courts of common law and equity. The action to prevent or abate nuisances is not one of these where it is amply provided for in the courts of general jurisdiction. This is so held in an action to recover damages to plaintiff's land by reason of the overflow of defendant's canal, and a motion was made to dismiss the case for want of jurisdiction which was sustained.²³ In another case a corporation filed with a county judge a petition for the condemnation of water, and for the right of way over defendant's land for conducting the same, and it was declared that the power to hear and determine a special case was judicial power and its nature or character was not changed in any respect by the fact that the Constitution did not assign it to some specified court, as it did the jurisdiction of most of the cases at law and in equity, and it was held that county courts were vested with jurisdiction in "special cases" in the absence of a statute conferring it upon other courts and that the legislature could confer such jurisdiction upon District and County Courts, but not upon a county

²² *Hercules Iron Works v. Elgin, Joliet & Eastern Ry. Co.*, 141 Ill. 491, 496, 30 N. E. 1050.

²³ *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43, 6 Am. Dec. 76.

judge or upon any tribunal or officer other than one of the courts specified in the Constitution.²⁴

§ 88. Subject-Matter and Jurisdiction Over It Defined.

In a cause of action to enforce mechanics' liens upon all the property of a mining company where an intervenor claimed a lien upon a part of the property only, and an order of sale was made of the entire property, directing a *pro rata* distribution, it was contended by counsel that, considered as one suit, there was jurisdiction of the subject-matter and that the order of sale was therefore not void though irregular. The court defined subject-matter as that which is offered for judicial decision, and declared that the subject-matter of the intervenor's petition was not the particular mining lode but his claim of lien upon that lode; that the subject-matter of the petitions of the other lien claimants was not the property mentioned in their petitions, but their claims of lien upon such property; "counsel, therefore, assume that which is contested when they say the court had jurisdiction of the subject-matter. The question is whether, *on the case before the court*, the action of the court was judicial or extrajudicial—with or without authority of law. * * * A claim of lien by" the intervenor "upon all the property of the defendant company was not a matter presented by any petition before the court. It was not, therefore, and could not be, the subject of an order or decree. Had such a lien been decreed, it would have been void. *A fortiori* the order of sale is void." ²⁵ In a West Virginia case, jurisdic-

²⁴ *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70, cited in *Chollar Mining Co. v. Wilson*, 66 Cal. 374, 377, an application for a writ of prohibition against proceedings for removal of corporate officers.

²⁵ *Bassick Mining Co. v. Schoolfield*, 10 Colo. 46, 51, 14 Pac. 65. The court, per Elbert, J., also said: "Had Armstrong" (the intervenor) "been the only lien claimant, and his petition the only petition before the court for consideration, it is entirely plain that, while the court had jurisdiction of the subject-matter of the petition, it had no power or authority to order a sale of property other than that mentioned in the petition, and upon which a lien had been decreed. Its jurisdiction was not invoked with respect to a claim of lien upon any other property, nor could it attach to any property other than that mentioned in the petition. * * * We think it equally plain that the defect of jurisdiction which we have pointed out was not

tion over the subject-matter is defined as meaning the nature of the cause of action and of the relief sought; that this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general character of its powers, or in authority specially conferred. The cause of action was against an insurance company to recover the entire amount of money found due on the adjustment of a fire loss, to which action the insurer set up the defense of payment of a portion of the money under a foreign judgment and order made in garnishment proceedings. It appeared, however, that such judgment was based upon a contract void as to the insured. It was held that the court of another State had not the power, without service of process or voluntary appearance, to render a judgment on a contract absolutely void in the State where made, and that if such a void contract is sued on by a foreign attachment in a foreign jurisdiction, the garnishee must make defense to the action or notify, if practicable, his absent creditor of the pendency of the attachment proceedings, that such creditor may make a defense, otherwise a judgment rendered by default will not protect the garnishee when sued by his creditor.²⁸

**§ 89. Definitions—"Civil" and "Criminal" Jurisdiction—
—"Further Civil and Criminal Jurisdiction."**

The terms "civil" and "criminal" when used either in reference to jurisdiction or judicial proceedings generally, were by the fact that jurisdiction of the court had attached to all the property under and by virtue of the petitions of the other lien claimants. Their petitions did not invoke the jurisdiction of the court in respect to the Armstrong claim. We do not see that the court had any greater or different jurisdiction than if the subject-matter of each petition had been tried and adjudicated separately. The same fundamental principles fix the limits of the power and authority of the court in the one case as in the other." The effect of Gen. Stat., § 2155, providing that "judgment is to be rendered according to the rights of the parties" and each party is to have a lien established and determined in said decree "upon the property to which his lien shall have attached" was also considered as another reason for the decision as rendered.

²⁸ *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 740, 44 L. R. A. 104, 32 S. E. 218; *McWhorter, J.*, in giving the above definition quotes from *Cooper v. Reynolds*, 10 Wall. (77 U. S.) 308, 316, 19 L. ed. 931.

have respect to the nature and form of the remedy and the cause of action or occasion for instituting legal proceedings. A competent court for the prosecution of either class of actions is one having lawful jurisdiction; and civil jurisdiction simply means jurisdiction to hear and determine civil actions. To enlarge the civil jurisdiction of that class of actions is merely to give jurisdiction over other actions for the recovery of a right or the redress of a wrong and has no respect whatever to the territorial limit of the jurisdiction over persons. When a Constitution speaks of "further civil and criminal jurisdiction" it has respect to the object of the jurisdiction and not to the territory or persons of suitors. When, therefore, a State Constitution continues certain local courts, then in existence in cities, with the powers and jurisdiction then possessed by them, "and such further civil and criminal jurisdiction as may be conferred by law" the words have respect to the object of the jurisdiction and not to the territory or the persons of the suitors, and the power conferred upon the legislature is to enlarge the then jurisdiction over subjects and matters civil and criminal in their nature and the proper subjects of civil and criminal prosecutions. The authority given is to enlarge their jurisdiction as local courts, not to create new courts with general jurisdiction throughout the State. When a jurisdiction is spoken of, it has not respect to the residence of the plaintiff, but the subject-matter and cause of action and the person of defendant; and the jurisdiction of these local courts is limited to causes of action arising within the territorial limits of the tribunal or to cases in which the party proceeded against resides in or is served with process within the jurisdiction. Jurisdiction cannot be conferred upon them based simply upon the fact that the plaintiff is domiciled in or casually chances to be within the locality. It was, therefore, decided that a City Court, under such provision of the Constitution, had no jurisdiction of an action against a corporation for negligence as a common carrier, where the cause of action arose and the business of the corporation was transacted, and its officers located outside of the city constituting the jurisdictional

limits, and that statutes attempting to give such jurisdiction were unconstitutional and void.²⁷

²⁷ *Landers v. Staten Island R. Co.*, 53 N. Y. 450, cited in *Worthington v. London Guarantee & Accident Co.*, 164 N. Y. 81, 89, 31 Civ. Pro. 282, 58 N. E. 102; *Matter of City of Buffalo*, 139 N. Y. 422, 427, 34 N. E. 1103, 54 N. Y. St. R. 1103; *McCann v. Gerding*, 60 N. Y. Supp. 467, 470, 29 Misc. 288; *Irwin v. Metropolitan St. Ry. Co.*, 57 N. Y. Supp. 19, 22, 38 App. Div. 255, 6 Ann. Cas. 376; *Tobias v. Perry*, 54 N. Y. Supp. 716, 719, 25 Misc. 78; *Weidman v. Sibley*, 44 N. Y. Supp. 1057, 1059, 16 App. Div. 619; *Ziegler v. Corwin*, 42 N. Y. Supp. 855, 862, 12 App. Div. 71; *Pierson v. Fries*, 38 N. Y. Supp. 765, 766, 3 App. Div. 420.

Jurisdiction of New York municipal court, see the following cases: *Erkins v. Tucker*, 115 N. Y. Supp. 256 (no equity jurisdiction); *American Mfg. Co. v. Weintraub*, 115 N. Y. Supp. 88 (allegation not demurrable for want of jurisdiction in averring that plaintiff is a foreign corporation and not showing defendants are residents of city); *Rothstein v. Brooklyn Heights R. Co.*, 114 N. Y. Supp. 344 (in case of action for personal injuries caused by being struck by a street car conductor, when plaintiff not a passenger, no jurisdiction under Municipal Court Act, Laws 1902, p. 1499, c. 580, § 1, subd. 14); *Woodward Lumber Co. v. General Supply & Construction Co.*, 113 N. Y. Supp. 628, 60 Misc. 367 (in action by foreign corporation to recover money judgment only City Court of New York has jurisdiction under Code Civ. Proc., § 315, subd. 1); *Telser v. Brooklyn Elevated Rd. Co.*, 113 N. Y. Supp. 18, 61 Misc. 59 (no jurisdiction of action for malicious prosecution, even though joined with another action over which jurisdiction exists; under Municipal Court Act, § 1, subd. 14, Laws 1902, p. 1489, chap. 580); *Miller v. Brooklyn Heights Rd. Co.*, 111 N. Y. Supp. 47, 127 App. Div. 197 (case of refusal of passenger to pay fare and attempt to eject her; action held to be for battery and court without jurisdiction); *Edwards v. Greenwich Savings Bk.*, 110 N. Y. Supp. 920, 59 Misc. 451 (when City Court without jurisdiction in action on savings bank account by the transferee of book and bank sets up judgment setting aside transfer, even though equitable defenses available); *Ebling Brewing Co. v. Nimphins*, 109 N. Y. Supp. 808, 58 Misc. 545 (case of nonequitable jurisdiction of proceedings to redeem leased premises); *Baumstein v. New York City Ry. Co.*, 107 N. Y. Supp. 23, 56 Misc. 498 (aggravated assault by street car conductor upon passenger and latter's arrest; court has jurisdiction); *Leyden v. Brooklyn Heights Rd. Co.*, 106 N. Y. Supp. 769, 122 App. Div. 383 (has jurisdiction of case for damages sustained through negligence of company in causing injuries to wife and consequent loss of personal services); *Jacobs v. Columbia Storage Warehouse*, 105 N. Y. Supp. 276, 55 Misc. 268 (action to recover personal property, under conditional sale, brought by assignee claiming lien for storage against buyer; no jurisdiction); *Schwartz v. Interborough Rapid Transit Co.*, 103 N. Y. Supp. 80, 53 Misc. 289 (action for assault and battery by company's servant; no jurisdiction; otherwise, where cause of action and assault arose from violation of defendants' contract to carry solely); *Gormley v. Brooklyn Heights Rd. Co.*, 102 N. Y. Supp. 692, 52

§§ 90, 91 JURISDICTION AND VENUE—DEFINITIONS

§ 90. Jurisdiction as Applied to a State, or to City Council.

Jurisdiction as applied to a State, signifies the authority to declare, and the power to enforce the law, as well as the territory within which such authority and power may be exercised. The jurisdiction of a State is coextensive with its sovereignty.²⁸ Where a statute provides that "the city council shall be deemed to have acquired jurisdiction to order" certain work in streets and alleys to be done, the term "jurisdiction," implies that the person or tribunal which has "acquired" it, is thereby empowered to declare or establish an enforceable charge or liability against the person or subject over which it has been acquired.²⁹

§ 91. Venue Defined.

Venue is defined as locality, neighborhood; place of trial; county. The county where a cause is to be tried. The clause in a declaration or indictment which states the place where the transaction was had, the injury inflicted or the crime committed. Originally a venue was employed to indicate the county from which the jury was to come.³⁰

Misc. 495 (case of refusal of street railroad company to give transfer, action for penalty and where action to be brought; no conflict between Code Civ. Proc., §§ 983, 991, and Municipal Court Act, Laws 1902, p. 1496, chap. 580, § 20, *Id.*, p. 1498, § 1, subdv. 7 (p. 1488).

²⁸ *Sanders v. St. Louis & New Orleans Anchor Line*, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390. A case of action for death caused by negligence of a corporation of Missouri instituted by a resident of that State; the deceased was drowned on the Mississippi River between Illinois and Missouri while the boat was at the Illinois shore. It was held that the Missouri courts had jurisdiction. But examine *Chicago, Burlington & Quincy Rd. Co. v. Cass County*, 51 Neb. 369, 70 N. W. 955.

²⁹ *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628, 634, 45 Pac. 863 (a case of street paving contract, and authority of a board of supervisors and limitations thereon).

³⁰ *Anderson's Dict. of Law*.

For other definitions of venue see the following cases:

Massachusetts: *Briggs v. Nantucket Bank*, 5 Mass. 94, 96.

Michigan: *Sullivan v. Hull*, 86 Mich. 7, 13, 48 N. W. 646, 647, 13 L. R. A. 556.

Nevada: *State v. McKinney*, 5 Nev. 194, 198, 199.

New York: *Bangs v. Selden*, 13 How. Pr. (N. Y.) 374, 377; *Moore v. Gardner*, 5 How. Pr. (N. Y.) 243.

Texas: *Armstrong v. Emmet*, 16 Tex. Civ. App. 242, 244, 41 S. W. 87.

Utah: *Konold v. Rio Grande Western Ry. Co.*, 16 Utah, 151, 156, 51 Pac. 256, 257.

CHAPTER VIII

JURISDICTION OR POWER OF CORPORATION SUPERVISORY
BODIES—GENERALLY

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| <p>§ 92. Jurisdiction or Power of Supervisory Bodies or Agencies—Delegation of Power—Generally.</p> <p>93. Jurisdiction of Power of Supervisory Bodies or Agencies—Delegation of Power—General Instances.</p> <p>94. Jurisdiction or Powers of Assessment Board—Railroads—Due Process of Law—Interstate Commerce.</p> <p>95. Jurisdiction or Power of Supervisors, Aldermen or Other Legislative Bodies of Cities, Towns, etc., as to Water Rates—Mandamus.</p> <p>96. Powers of Municipality—Railroad Commission and Borough President—Laying Electric Lines—Repaving by Street Railroad.</p> | <p>§ 97. Powers of Commission as to Standard Fire Policy.</p> <p>99. Jurisdiction or Powers of Court of Visitation—Telegraph and Railroad Lines.</p> <p>99. Powers of Secretary of Agriculture—Regulation of Commerce—Quarantine Regulations.</p> <p>100. Secretary of Commerce and Labor—Enforcement by, Without Judicial Trial, of Penalty of Transportation Company—Notice and Hearing—Civil and Criminal Action.</p> <p>101. Power of Secretary of State—Reinsurance Contract.</p> <p>102. Special Tribunal—"Special Commission" to Hear and Adjudicate, Not a "Court"—Gas and Electric Plant.</p> |
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§ 92. Jurisdiction or Power of Supervisory Bodies or
Agencies—Delegation of Power—Generally.

In the execution of the power to regulate commerce Congress may employ, as instrumentalities, corporations created by it or by the States.¹ The legislature may also properly designate any agency it deems proper within the State, reasonably calculated to act justly in the matter, to nominate persons for appointment to administer police regulations.² So the State may transfer its reserved police power from one set of func-

¹ *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. 965.

² *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, 10 N. W. 500.

tionaries to another by requiring electrical companies to submit plans, etc., to the latter for constructing electrical conduits or subways.³ Where a statute acts on a subject as far as practicable and only leaves to executive officials the duty of bringing about the result pointed out and provided for, it is not unconstitutional as vesting executive officers with legislative powers.⁴ So a distinction exists between the power to make a law, which involves a discretion as to what that law shall be, and employing an agency which is empowered to exercise a discretion in determining when the law as enacted shall be enforced, or to determine questions of fact essential to the application of the law; the power to legislate which is vested in the State cannot be delegated; the administrative duties in carrying out legislative powers may be delegated.⁵

§ 93. Jurisdiction of Power of Supervisory Bodies or Agencies—Delegation of Power—General Instances.

Judicial power is not unconstitutionally conferred on a State board of control to adjudicate priority of water rights with the right of appeal, as such board is an administrative one.⁶ A State statute may also require each surveyor general to survey all logs and timbers running out of any boom, chartered or to be chartered by law in his district, and such enactment refers to corporations organized under general law or by special act.⁷ So power may be delegated to a municipal corporation

³ *New York v. Squire*, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. ed. 666.

⁴ *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 252; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294.

⁵ *United States v. Union Bridge Co.*, 143 Fed. 377; *People v. Grand Trunk Ry. Co.*, 232 Ill. 292, 297, 83 N. E. 839, per Carter, J., quoting *Sutherland on Statutory Construction*, p. 611.

⁶ *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, 87 Am. St. Rep. 918, 50 L. R. A. 747.

As to delegation to, extent of jurisdiction or power of, and enumeration of subordinate bodies or agencies to whom delegated, see *Joyce on Franchises*, §§ 147-170; as to delegation of power to and by courts, see *Id.*, §§ 171-184; as to delegation of power—quasi-municipal and subordinate agencies, see *Id.*, §§ 185-205.

⁷ *Lindsay & Phelps Co. v. Mullen*, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. ed. 400.

to regulate charges of common carriers to the city.⁸ A State may also, through the instrumentality of a city council, apportion the burden of repairs for a viaduct crossing several railroads.⁹ The authority of a borough council to consent to the location of electric street railway tracks upon notice as required by statute is not a judicial but a legislative act.¹⁰ And a delegation to a supervisor of building and loan associations confers neither legislative nor judicial power.¹¹ An agreement of the commissioners of the sinking fund of a city and the city attorney with certain banks, trust companies, etc., including the bank of the city, that the rights of those institutions should abide the results of test suits to be brought is *dehors* the power of said commissioners and said attorney, and a decree in such test suit does not constitute *res judicata* as to those not actually parties to the record.¹²

§ 94. Jurisdiction or Powers of Assessment Board— Railroads—Due Process of Law—Interstate Commerce.

A State statute giving a State assessment board power to correct valuations, naming a time and place at which any person interested may be heard, does not deprive the persons assessed of their property without due process of law because those parties do not have further opportunities to be heard by a court or the legislature.¹³

If an assessing board, seeking to assess for purposes of taxa-

⁸ *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, 59 L. R. A. 631, 65 N. E. 451.

⁹ *Chicago, Burlington & Quincy Rd. Co. v. Nebraska*, 170 U. S. 57.

¹⁰ *State v. West Jersey Traction Co.*, 62 N. J. L. 386, 41 Atl. 946, aff'g 61 N. J. L. 470, 39 Atl. 681, 10 Am. & Eng. R. Cas. (N. S.) 323.

¹¹ *Preferred Tontine Mercantile Co. v. Nevada*, 199 U. S. 613, 50 L. ed. 334, 26 Sup. Ct. 748, dismissing 184 Mo. 160, 82 S. W. 1075.

¹² *Louisville v. Bank of Louisville*, 174 U. S. 439, 43 L. ed. 1039, 19 Sup. Ct. 753, affirming and applying *Stone v. Bank of Commerce*, 174 U. S. 412, 19 Sup. Ct. 747, 43 L. ed. 1028; *Citizens' Savings Bank of Owensboro v. Owensboro*, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. ed. 840.

¹³ *Michigan Central R. Co. v. Powers*, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. 459, aff'g 138 Fed. 223.

When duties imposed on tax collector are unconstitutional delegation of power, see *Cleveland, Cincinnati & St. Louis Ry. Co. v. The People*, 212 Ill. 63, 72 N. E. 725.

tion a part of a railroad within a State, the other part of which is in an adjoining State, ascertains the value of the whole line as a single property and then determines the value of that within the State, upon the mileage basis, that is not a valuation of property outside of the State; and the assessing board, in order to keep within the limits of State jurisdiction, need not treat the part of the road within the State as an independent line, disconnected with the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road. And where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a State forming part of a line of road running into another State, and assesses those miles of road at their actual cash value determined on a mileage basis, this does not place a burden upon interstate commerce, beyond the power of the State, simply because the value of that railroad as a whole is created partly—and perhaps largely—by the interstate commerce which it is doing.¹⁴

§ 95. Jurisdiction of Power of Supervisors, Aldermen or Other Legislative Bodies of Cities, Towns, etc., as to Water Rates—Mandamus.

A State may make it the official duty of a board of supervisors, town council, board of aldermen, or other legislative body of any city and county, city or town, in the State to annually fix the rates that shall be charged and collected for water furnished. It is also competent for a State to declare that the use of all water appropriated for sale, rental, or distribution, shall be a public use, subject to public regulation and control; but this power cannot be exercised arbitrarily and without reference to what is just and reasonable between the public and those who appropriate water, and supply it for general use.¹⁵

¹⁴ *Cleveland, C., C. & St. L. Ry. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. ed. 1041.

¹⁵ *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804. See also *Stanislaus County v. San Joaquin & Kings River Canal & Irrig. Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241, rev'g 113 Fed. 930.

To regulate or establish rates for which water will be supplied is, in its nature, the execution of one of the powers of the State, and the right of the State to do so should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of such an alleged contract should in both cases be equally plain.¹⁶ So a provision in a State water act that county boards of supervisors should regulate water rates but could not reduce them below a certain point, does not amount to a contract with water companies which would be impaired within the meaning of the Federal Constitution by a subsequent act either reducing the rates below such point or authorizing boards of supervisors to do so.¹⁷ A State statute may also confer upon a board of public officers, such as the commissioner of waterworks, a discretion to make a contract with the "lowest and best" bidder, and this discretion cannot be controlled by mandamus.¹⁸

§ 96. Powers of Municipality—Railroad Commission and Borough President—Laying Electric Lines—Repaving by Street Railroad.

As chap. 483 of the laws of 1881, now part of § 102 of the Transportation Corporations Law of New York, provides that companies organized for the purpose of maintaining lines of electric telegraphs within the State can operate provided they obtain the consent of the municipal authorities before laying lines in

¹⁶ *Stanislaus County v. San Joaquin & Kings River Canal & Irrig. Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241, rev'g 113 Fed. 930. See *Osborn v. San Diego Land & Town Co.*, 178 U. S. 22, 20 Sup. Ct. 860, 44 L. ed. 961.

¹⁷ *Stanislaus County v. San Joaquin & Kings River Canal & Irrig. Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. 241, rev'g 113 Fed. 930.

As to ordinances of municipal corporations; contract rights; obligation of contract and regulation of water rates, see *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. 763; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. 493 (followed in *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. 490; *Danville Water Co. v. Danville City*, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. ed. 696); *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886. See also § 37, herein.

¹⁸ *State of Ohio ex rel. Walton v. Herman*, 63 Ohio St. 440.

the streets of any city, village or town, a corporation organized after the passage of said act, or its successor, cannot extend its lines within the city of New York or lay additional wires without the consent of the municipal authorities.¹⁹ Under the charter of the city of New York a borough president, subject to the control of the board of estimate and apportionment, is the proper person to determine when, how and under what circumstances a street shall be repaved.²⁰ In Connecticut, municipal authorities jointly with the railroad commissioners are agents of the State in the control of the use of highways for street railways, and the commissioners, in some particulars, exercise the control through original and exclusive action, and may exercise it in all particulars either through original and appellate or final action. But in the absence of action by the railroad commissioners the municipal authorities in that State may exercise the full direction and control given by statute in respect to placing electric wires and conductors in the highways by a street railway company for the purpose of transmitting and applying electricity as the motive power for operating its railway, subject, however, to final action of the railroad commissioners; and any authorized action relating to street railways, taken by local municipal authorities, may be retried and determined by the railroad commissioners.²¹

¹⁹ New York Independent Telephone Co., Matter of, 133 App. Div. 635.

The syllabus to this case as reported in the New York Supplement reads as follows: Where a State law in force until repealed, Laws 1881, p. 656, chap. 483, in force until repealed by Laws 1909, chap. 219; Consol. Laws, p. 1613, chap. 63, provided that any company incorporated under the laws of the State for the purpose of owning and maintaining a telegraph line or lines wholly or partly within the State may lay lines underground in any city, etc., within the State, provided that it shall before doing so first obtain from the common council, etc., permission to use the streets for the purpose. It was held that a burglar alarm corporation incorporated by the State in 1890 with power to use telegraph wires had no authority to use the streets of New York City, where it had not obtained the consent of the board of aldermen. In re New York Independent Tel. Co., 118 N. Y. Supp. 290, 133 App. Div. 635.

²⁰ New York City v. New York City Ry. Co., 132 App. Div. 156, a case as to the obligation of street railroads to relay pavements between tracks.

²¹ New York, New Haven & Hartford Co.'s Appeal, 80 Conn. 623, 70 Atl. 26.

§ 97. Power of Commission as to Standard Fire Policy.

A delegation of power to a commission to draft, etc., a standard form of fire insurance policy is unconstitutional as conferring legislative power.²²

§ 98. Jurisdiction or Powers of Court of Visitation—Telegraph and Railroad Lines.

A Court of Visitation created with power to regulate telegraphic and railroad lines within a State is a legislative and administrative body, and the fact that the legislature denominates such tribunal a court is not conclusive as to its true character nor as to the nature of the jurisdiction and powers conferred upon it; but a statute is unconstitutional which combines in such body legislative functions to make laws and regulations with the power to exercise judicial powers by passing upon the validity of such laws and regulations and enforcing its own judgments and orders.²³ A chapter of a certain enactment extending the power, jurisdiction and control of a Court of Visitation over telegraph companies and telegraphic service within a State will be held in *pari materia* with another chapter of the statutes passed the same year creating a court of visitation and attempting to extend its power, jurisdiction and control over the railways of the State, and it must be construed in connection with that statute the same as though both chapters constituted one enactment.²⁴

§ 99. Power of Secretary of Agriculture—Regulation of Commerce—Quarantine Regulations.

Whether or not the Cattle Contagious Disease Act ²⁵ is constitutional as delegating power solely vested in Congress to the Secretary of Agriculture, that act confers no power on such secretary to make any regulations concerning intrastate com-

²² *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N. W. 616, 12 Det. L. N. 160. See also *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72, 30 Atl. 943, 45 Am. St. Rep. 650, 26 L. R. A. 715.

²³ *Western Union Teleg. Co. v. Myatt* (U. S. C. C.), 98 Fed. 335.

²⁴ *Western Union Teleg. Co. v. Austin*, 67 Kan. 208, 72 Pac. 850.

²⁵ Of Feb. 2, 1903, 33 Stat. 1264.

merce over which Congress has no control. An order, therefore, of that officer, purporting to fix a quarantine line under the above enactment, and which applies in terms to all shipments whether interstate or intrastate, is void as an attempt to regulate intrastate commerce, notwithstanding it is the same line as that fixed for a similar purpose as to intrastate shipments by the State through which it passes. While in a proper case Federal authorities may adopt a quarantine line adopted by a State, still where the secretary makes regulations adopting it as applying to all commerce whether interstate or intrastate, and nothing on the face of the order indicates whether he could have made such an order if limited to interstate commerce, the order is not divisible and the Federal Supreme Court cannot declare that it relates solely to interstate commerce but must hold it void as an entirety.²⁸

§ 100. Secretary of Commerce and Labor—Enforcement by, Without Judicial Trial, of Penalty on Transportation Company—Notice and Hearing—Civil and Criminal Action.

²⁸ *Illinois Central Railroad v. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. ed. 298. The record here showed that the case as made by the plaintiff below was to recover damages for the infection of cattle, because of coming in contact with cattle transported by the railroad company from a point south to a point north of the quarantine line established by the Secretary of Agriculture, in a manner violative of regulations for the transportation and keeping of cattle established by the Secretary's order. The Government objected to the jurisdiction of the Supreme Court to entertain the writ of error, upon the ground that no Federal question was raised within the intent and meaning of § 709, Revised Statutes, but that court was of opinion that such questions were raised, and that it was required upon the record to review the judgment of the State Court. "The railroad company, by the proceedings and judgment in this case, was denied the alleged Federal rights and immunities specially set up in the proceedings, in the enforcement of a statute and departmental orders averred to be beyond the constitutional power of Congress and the authority of the Secretary of Agriculture, and in the rendition of a judgment for damages in an action under the statute and order, in opposition to the insistence of the defendant that, even if constitutional, the statute did not confer such power or authorize a judgment for damages." *Id.*, 526, per Mr. Justice Day.

What is not a delegation of legislative power to Commissioner of Agriculture, see *State v. Southern Ry. Co.*, 141 N. C. 846, 54 S. E. 29.

It is within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial powers. The prohibition, therefore, of the Alien Immigration Act²⁷ against bringing into the United States alien immigrants afflicted with loathsome and contagious diseases is within the absolute power of Congress, and such provision is not unconstitutional because it provides that the Secretary of Commerce and Labor may, without judicial trial, impose upon and exact penalties from a transportation company for violation of its provisions; nor is the imposition of such penalty in such case by an executive officer where so authorized by Congress, in a matter of this kind and wholly within its competency, unconstitutional under the Fifth Amendment as taking property without due process of law. The greater includes the less, and where Congress has power to sanction a prohibition by penalties enforceable by executive officers without judicial trial on the ascertainment in a prescribed manner of certain facts, the person upon whom the penalty is imposed is not entitled to any hearing in the sense of raising an issue and tendering evidence as to the facts so ascertained, and is not, therefore, denied due process because the time which the executive officer allows him after notice of the ascertainment and imposition to produce evidence as to certain facts on which the fine might be remitted is too short. Again, the authority given by Congress in the above-stated act to the Secretary of Commerce and Labor to impose an exaction on a transportation company bringing to the United States an alien immigrant afflicted with a loathsome contagious disease when the medical examination establishes that the disease existed, and could have been detected by medical examination at the time of embarkation, does not purport to define and punish any criminal offense, but merely entails the infliction of a penalty enforceable by civil suit; nor

²⁷ Act of March 3, 1903, § 9, chap. 1012, 32 Stat. 1213.

is the enforcement necessarily governed by the rules controlling the prosecution of criminal offenses.²⁸

The court, per Mr. Justice White,²⁹ said: "The exaction which the section authorizes the Secretary of Commerce and Labor to impose, when considered in the light afforded by the context of the statute, is clearly but a power given as a sanction to the duty, which the statute places on the owners of all vessels, to subject alien emigrants, prior to bringing them to the United States, to medical examination at the point of embarkation, so as to exclude those afflicted with the prohibited diseases. In other words, the power to impose the exaction which the statute confers on the secretary is lodged in that officer only when it results from the official medical examination at the point of arrival not only that an alien is afflicted with one of the prohibited diseases, but that the stage of the malady as disclosed by the examination establishes that the

²⁸ *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. 671, aff'g 155 Fed. 428, distinguishing *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. 977, following *Hepner v. United States*, 213 U. S. 103, 53 L. ed. 720, 29 Sup. Ct. 474. In the principal case a steamship company sought the recovery of money paid to the collector of customs of the port of New York which was exacted by that official under an order of the Secretary of Commerce and Labor. Under the findings of the court, the case having, by stipulation, been tried without a jury, there was no doubt that the money was paid to the collector under protest, and involuntarily, the company being coerced by the certainty that if it did not pay the collector would refuse a clearance to its steamships plying between New York City and foreign ports at periodical and definite sailings, whose failure to depart on time would have caused not only grave public inconvenience from the nonfulfillment of mail contracts, but would also have entailed upon the company the most serious pecuniary loss consequent on its failure to carry out many other contracts, both the secretary and the collector were expressly authorized by law, the one to impose and the other to collect the exactions which were made, and the only question, therefore, was whether the power conferred upon the named officials was consistent with the Constitution. The act, the constitutionality of which was called in question and under which the officials acted was § 9 of the act of March 3, 1903, chap. 1012, 32 Stat. 1213. This provision extended to "any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel."

²⁹ *Id.*, 332, 342.

alien was suffering with the disease at the time of embarkation, and that such fact would have been then discovered had the medical examination been then made by the vessel or its owners, as the statute requires. We think it is also certain that the power thus lodged in the Secretary of Commerce and Labor was intended to be exclusive, and that its exertion was authorized as the result of the probative force attributed to the official medical examination for which the statute provides, and that the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency not requiring a resort to judicial power for their enforcement. * * * It is not denied that there was full power in Congress to provide for the examination of the alien by medical officers and to attach conclusive effect to the result of that examination for the purposes of exclusion or deportation. But it is said the power to do so does not include the right to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien. We think the argument rests upon a distinction without a difference. It disregards the purpose which, as we have already pointed out, Congress had in view in the enactment of the provision, that is, the guarding against the danger to arise from the wrongful taking on board of an alien afflicted with a contagious malady."

§ 101. Power of Secretary of State—Reinsurance Contracts.

A statute is not unconstitutional as attempting to delegate legislative or judicial powers upon a Secretary of State when it requires such officer's approval to reinsurance contracts of life risks.²⁰

§ 102. Special Tribunal—"Special Commission" to Hear and Adjudicate Not a "Court"—Gas and Electric Light Plant.

A statute may create a special tribunal for hearing and decid-

²⁰ Iowa Life Ins. Co., 64 N. J. L. 340, 45 Atl. 762.

ing upon claims against a municipal corporation which have no legal obligation, but which the legislature thinks have sufficient equity to make it proper to provide for their investigation and payment when found proper, and it does not in any way regulate the practice in courts of justice.³¹

In a case of importance decided in Connecticut a statute of that State³² allows cities and towns to establish gas or electric plants for furnishing light for municipal use and the use of citizens paying therefor, but requires the municipality, before setting up its own plant, to purchase the local plant of a specially chartered corporation engaged in like business, if there be one, provided such corporation shall elect to sell and comply with the terms of the act. In case of a disagreement as to what shall be sold, or as to the terms of sale, the act provides that either party may apply to the Superior Court for the appointment of a "special commission," who shall hear the parties and "adjudicate" those matters, and that its doings shall be reported to said court for confirmation. If a remonstrance to the report is sustained, the court is to set aside the report in whole, or in part, as justice may require, and appoint another "special commission"; and this procedure is to be repeated, if necessary, until the report, "covering all questions involved" has been confirmed by the Superior Court, which may compel compliance with its final decree and issue and enforce such interlocutory orders as justice may require; upon appeal by the defendant from a judgment of the Superior Court accepting and confirming the action of such a commission it was held:—(1) That the question of constitutionality of the act³³ was one beyond the province of the special commission, its duty being simply to execute the powers confided to it by the Superior Court. (2) That the special commission was not a "court," nor its members "judges," within the meaning of the Constitution of the State³⁴

³¹ *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 19 Sup. Ct. 513, 43 L. ed. 796.

³² Chapter 231 of the Public Acts of 1893, now §§ 1978–1997 of the General Statutes.

³³ Of 1893.

³⁴ Article 5, §§ 1, 3.

which requires courts to be established and judges appointed by the General Assembly. (3) That the compulsory purchase feature of the act did not confer "exclusive public emoluments or privileges" upon the plaintiff in violation of the State Constitution³⁵ since the duty of purchasing such plants rested equally on all municipalities seeking to take advantage of the statute, and was owed equally to all corporations in the situation of the plaintiffs. While no man or set of men are entitled to demand exclusive privileges from the State, it may grant them, for proper cause and on equal terms, to certain sets of men or classes of corporations. (4) That the legislature had the right to create a particular kind of administrative tribunal to decide questions regarding the value of property to be appropriated to a public use, whether by a public or a private corporation, and the method and terms of such appropriation. (5) That in estimating the sum to be paid by the city for the plaintiff's property, the commission was not confined to a valuation of the bare physical plant, and committed no error in taking into account its earning capacity as a going concern, based upon its actual earnings, the expense of operation and the changes, if any, needed for the reasonable improvement of the plant, and the probable results thereof as bearing upon the output; also the fact that the plaintiff had an established business, built up at the risk of private capital after experiments and changes during a long period, as well as the policy of the State in dealing with public service corporations like the plaintiff, in so far as that policy or purpose was manifested by the terms of the statute. (6) That it was unnecessary and could serve no useful purpose, for the commission to specify separately each item of value which it included in the purchase price fixed by it. (7) That it was within the jurisdiction of the Superior Court, in framing the final judgment, to provide for the due fulfillment of the terms and conditions of sale laid down in the report, although it could not impose other or additional obligations upon the parties. (8) That the judgment in fixing the date of the sale and transfer; settling the particular form of the

³⁵ Article 1, § 1.

§ 102 JURISDICTION OR POWER OF CORPORATION

warranty deed and bill of sale and the date and manner of their delivery; in computing interest and liquidating the precise amount of the purchase price; and in ordering the issue of an execution for the amount due at the date fixed for payment, did not depart from, but merely gave effect to the terms of the report. (9) That the sale of the plant, subject to the mortgage, as directed by the commission, imposed no direct obligation upon the city to pay the mortgage bonds or interest thereon, and therefore a clause of the judgment which required the city to reimburse the plaintiff for such installments of interest as it should thereafter pay, was erroneous, and unauthorized either by the statute or the commission's report. Under such circumstances the plaintiff must look solely to its equitable charge upon the mortgaged property for indemnity.³⁵

³⁵ *Norwich Gas & Electric Co. v. Norwich*, 76 Conn. 565.

CHAPTER IX

JURISDICTION OR POWERS OF SUPERVISORY CORPORATION COMMISSIONS CONTINUED

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| <p>§ 103. Jurisdiction of Interstate Commerce Commission—Nature of Powers of.</p> <p>104. Jurisdiction of Interstate Commerce Commission—Rates—Rebates—Discrimination.</p> <p>105. Same Subject—Instances.</p> <p>106. Jurisdiction of Interstate Commerce Commission—Rates—Promulgation of General Orders.</p> <p>106a. Jurisdiction of Interstate Commerce Commission—Carriers Discriminatory Regulations—Railroad Equipment—Coal Car Distribution.</p> <p>107. Power of State as to Railroad and Like Commissions.</p> <p>108. Same Subject.</p> <p>109. Same Subject—Power to Remove or Suspend Commissions.</p> <p>110. Jurisdiction and Power of Railroad and Like Commissions—Generally.</p> <p>111. Same Subject.</p> <p>112. Nature of Jurisdiction and Power of Railroad Commissions.</p> <p>113. Jurisdiction of Railroad Commissions—Rates.</p> | <p>§ 114. Same Subject.</p> <p>115. When Railroad Commission Is Without Jurisdiction—Rates.</p> <p>116. Jurisdiction of Railroad Commission—Increase of Capital Stock of Corporations.</p> <p>117. Jurisdiction of Public Service Commission—Issue of Stocks and Bonds by Corporation.</p> <p>118. Jurisdiction of Railroad Commission—Stopping Interstate Trains.</p> <p>119. Jurisdiction of Railroad Commission—Interstate Commerce—Delivery of Cars—Train Connections.</p> <p>120. Jurisdiction of Railroad Commissions—Railroad Station—Other Facilities—Obligation of Contract—Due Process of Law.</p> <p>121. Jurisdiction of Railroad Commissions—Railroad or Grade Crossings—Apportionment or Expense of.</p> <p>122. Jurisdiction of Railroad Commissions—Telegraph Companies—Installing Telephone.</p> |
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§ 103. Jurisdiction of Interstate Commerce Commission—Nature of Powers of.

The Interstate Commerce Commission is a body corporate

with legal capacity to be a party plaintiff or defendant in the Federal Courts.¹ It was decided in 1889 that the Interstate Commerce Commission is invested only with administrative powers of suspension and investigation which fall far short of making the board a court, or its action judicial in the proper sense of the term. The commission hears, investigates, and reports upon complaints made before it, undoing alleged violations or omissions of duty under the act; but subsequent judicial proceedings are contemplated and provided for as the remedy for the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of or against whom its decision is rendered does not yield voluntary obedience thereto. The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every Federal Circuit Court upon which the jurisdiction is conferred enforcing the rights, duties and obligations recognized and imposed by the act. It is neither a Federal Court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings.²

¹ *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940.

² *Kentucky & Indiana Bridge Co. v. Louisville & Nashville Rd. Co.* (U. S. C. C.), 37 Fed. 567.

See also the following cases: *Interstate Commerce Commission v. Cincinnati, New Orleans & T. P. Ry. Co.* (U. S. C. C., 1896), 76 Fed. 183 (I. C. C. is not invested with either legislative or purely judicial power; is administrative body with certain incidental and quasi-judicial powers); *Interstate Commerce Commission v. Louisville & Nashville Rd. Co.* (U. S. C. C., 1896), 73 Fed. 409 (function of I. C. C. is both quasi-judicial and administrative in nature); *Interstate Commerce Commission v. Cincinnati, New Orleans & T.*

§ 104. Jurisdiction of Interstate Commerce Commission—Rates—Rebates—Discrimination.

A private car company which delivers its cars to railroad companies to be furnished indiscriminately for the use of shippers, receiving pay for such use from the railroad companies on a mileage basis, is within the provision of the act of Congress³ making it unlawful for any person "or corporation to offer, grant, give, or solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier, * * * whereby any such property shall, by any devise whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, or whereby any other advantage is given or discrimination is practiced," and the giving by such car company of any rebate or allowance to a shipper using its cars, whereby he secures the transportation of his property at a less rate than that named in the published tariff of the carrier for transportation of such property, in its own cars, although from its own funds and without the connivance or knowledge of the carrier, is a violation of the statute. Such a car company is therefore subject to the jurisdiction of the Interstate Commerce Commission, charged with the duty of enforcing the statute and having power to inquire into the operations of any agency of transportation which may so conduct its business as to destroy uniformity of rates.⁴

The Southern Pacific and other railroads published a guaranteed through rate on citrous fruits from California to the Atlantic seaboard. The shippers availing themselves of this rate routed the goods from the terminals of the initial carriers and illegally obtained rebates for the routing from the connecting carriers. To prevent this—and the action was suc-

P. R. Co. (U. S. C. C., 1894), 64 Fed. 981 (I. C. C. not a court but administrative body exercising quasi-judicial powers).

³ Act of Feb., 1903, chap. 708, 32 Stat. 847, U. S. Comp. St. Supp., 1905, p. 599.

⁴ Syllabus in *Interstate Commerce Commission v. Reichmann*, 145 Fed. 237.

cessful—the initial carriers republished the rate, reserving the right to route the goods beyond their own terminals. On complaint of shippers the Interstate Commerce Commission ordered the initial carriers to desist from enforcing the new rule, holding it violated § 3 of the Interstate Commerce Act by subjecting the shippers to undue disadvantage. The Circuit Court sustained the commission, but on the ground that the routing by the carrier amounted, although no other agreement was proved in regard thereto, to a pooling of freights and violated § 5 of the act. It was held error, and that, as the general purpose of the act was to facilitate commerce and prevent discrimination it would not be construed so as to make illegal a salutary rule to prevent the violation of the act in regard to obtaining rebates; that the question of joint through rates was, under the act, one of agreement between the companies and under their control, and nothing in the act prevented an initial carrier guaranteeing a through rate from reserving in its published notice thereof the right to route the goods beyond its own terminal; that a carrier need not contract to carry goods beyond its own line, or make a through rate; if it had agreed so to do, it might do so by such lines as it chose, and upon such reasonable terms, not violative of the law, as it could agree upon; and this right did not depend upon whether it agreed to be liable for default of the connecting carrier; that the fact that the initial carrier, in order to break up the practice of rebating by the connecting carriers, promised them fair treatment and carried out the promise by giving them certain percentages of a guaranteed through rate business, did not amount to a pooling of freights within the meaning of § 5 of the Interstate Commerce Act; and also that a reservation applicable to a single business by the initial carrier, guaranteeing a through rate, of the right to route goods beyond its own terminal, did not amount to an unlawful discrimination within the prohibition of the act if the business was of a special nature, like the fruit business, having nothing in common with other freight.⁵

⁵ Southern Pacific Co. v. Interstate Commerce Commission, 200 U. S.

§ 105. Same Subject—Instances.

An order of the Interstate Commerce Commission, that carriers not charging for tanks on tank-oil shipments desist from charging for the barrel on barrel shipments, or else furnish tank cars to all shippers applying therefor is held to be equivalent to a holding that the charge for the barrel is not in itself excessive, and, therefore, that barrel-oil shippers who had not demanded tank cars had not been discriminated against, and were not entitled to reparation for the amounts paid by them on the barrel.⁶

Certain interstate carriers having established and for some time maintained a rate on steel rails and fastenings and other iron products from Chicago, Illinois, to San Francisco, California, and other Pacific coast points, the Interstate Commerce Commission ordered that the rates on such products from Pueblo, Colorado, an intermediate point, to such Pacific coast points, should not exceed seventy-five per cent of the rates contemporaneously in force from Chicago to the same points on the Pacific coast, and that the rate on steel rails and fastenings from Pueblo to San Francisco should not exceed forty-five cents per hundred, and that the rate on other iron products should not exceed thirty-seven and one-half cents per hundred. It was held that the commission had no more power to fix a rate from Pueblo to Pacific coast points by relation to the Chicago rate that had been or that might be established by the carriers themselves than it had to prescribe a maximum rate from Pueblo to Pacific coast points upon an independent consideration of what would be a reasonable charge for the service, and that its order was therefore void.⁷

A railroad engaged in interstate commerce does not violate the provisions of §§ 4 and 6 of the Interstate Commerce Act, by furnishing cartage for delivery free of charge to the mer-

536, 50 L. ed. 585, 26 Sup. Ct. 330, rev'g Interstate Commerce Commission v. Southern Pac. Ry. Co., 132 Fed. 829. See § 35, herein.

⁶ Penn. Refining Co. v. Western New York & Penn. Rd. Co., 208 U. S. 208, 28 Sup. Ct. 268, 52 L. ed. 456, aff'g 137 Fed. 343, 70 C. C. A. 23.

⁷ Syllabus in Southern Pacific Co. v. Colorado Fuel & Iron Co., 101 Fed. 779, 42 C. C. A. 12; Colorado Fuel & Iron Co. v. Southern Pacific Co., *Id.*

chants of one town on its line, and not furnishing similar service to the merchants of another town on its line thirty-three miles distant, nor by failing to publish such free cartage in the schedule published in the first town, when such privilege has been openly and notoriously enjoyed for twenty-five years. The fourth section of such act has in view only the transportation of passengers and property by rail, and when property transported as interstate commerce reaches its destination by rail at lawful rates, having regard to rates charged upon similar transportation to other points on the line, it does not concern the Interstate Commerce Commission whether the goods after arrival are carried to their place of deposit in vehicles furnished by the railroad company free of charge, or in vehicles furnished by the owners of goods; and the same rule applies to the transportation of passengers. In matters of this kind much should be left to the judgment of the commission, and, should it direct, by a general order, that railway companies should thereafter regard cartage, when furnished free, as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the commission's power.⁸ The Interstate Commerce Commission, in making an investigation on the complaint of a shipper has, in the public interest, the power disembarrassed by any supposed admissions contained in the statement of the complaint to consider the whole subject and the operation of the new classification complained of in the entire territory; also how far its going into effect would be just and reasonable and would create preferences or engender discriminations and whether it is in conformity with the requirements of the act to regulate commerce. And if it finds that the new classification disturbs the rate relations thereupon existing in the official classification territory and creates preferences and engenders discriminations it may, in order to prevent such result, prohibit the further enforcement of the changed classification, and an order to that effect is within the power conferred by Congress on the

⁸ *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.*, 167 U. S. 633, 42 L. ed. 310, 17 Sup. Ct. 957.

commission; and so held as to an order of the commission directing carriers from further enforcing throughout official classification in regard to common soap in less than carload lots.⁹

§ 106. Jurisdiction of Interstate Commerce Commission—Rates—Promulgation of General Orders.

Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum or minimum or absolute; and as it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal, after having determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future railroad companies should follow the rates thus determined to have been in the past reasonable and just.¹⁰ It is also held that the commission has original and

⁹ *Cincinnati, Hamilton & Dayton Ry. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. ed. 995, 27 Sup. Ct. 648, aff'g 146 Fed. 559.

¹⁰ *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45, aff'g 74 Fed. 715, 21 C. C. A. 51, adhering to the decisions in *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 167 U. S. 479, 44 L. ed. 243, 17 Sup. Ct. 896 (s. c., 76 Fed. 183); *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935. See also *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. 896, cited in *Siler v. Louisville & Nashville Rd. Co.*, 213 U. S. 175, 194, 29 Sup. Ct. 451, 53 L. ed. 753 [to point that commission is not clothed with jurisdiction, either upon complaint or upon its own information, to enter upon a general investigation of every rate upon every class of commodities carried by all the roads of the State from or to all points therein, and make a general tariff of rates throughout the State (such as was made in the citing case); and that no such power was given to the Interstate Commerce Commission]; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 291, 29 Sup. Ct. 55, 53 L. ed. 186 (to point that legislature may delegate to an administrative body the execution in detail of the legislative power of regulation); *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 29 Sup. Ct. 67, 53 L. ed. 150 (to point that the establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind); *Arkansas Railroad Rates, In re* (U. S. C. C.), 168 Fed. 720, 724 (to point that the making of carriers' rates is a legislative and not a judicial act and courts are powerless to make them; and also as to duty of courts to

exclusive jurisdiction to determine the question of the reasonableness of an established rate for the interstate transportation of freight, and when a schedule of rates has been duly filed and has gone into effect the rates thereby prescribed are the only lawful rates until changed by the commission.¹¹ Reasonably interpreted, the statute, by which alone the Interstate Commerce Commission derives its power, unmistakably requires that all rates prescribed thereunder shall be just and reasonable, within the constitutional guaranty, and also that they shall not be unjustly discriminatory or unduly preferential; and these requirements plainly operate as limitations upon the power of the commission. Neither Congress nor any legislative or administrative board acting by its authorization can competently establish rates for the transportation of property in interstate commerce that will not admit of the carrier earning such compensation for the service rendered as under all the circumstances is just and reasonable to it and to the public,

dissolve preliminary injunction or make it perpetual where commission rates on final hearing are shown to be compensatory or noncompensatory and confiscatory; the case also decided as to the power of the court to fix maximum rates and to what extent it may do so); *Macon Grocery Co. v. Atlantic Coast Line Rd. Co.* (U. S. C. C.), 163 Fed. 738, 749 ("It is insisted, however, that this power of the court cannot be exercised until the interstate commission has acted, but that commission is expressly denied the power of injunction or any judicial power. This, it has been conclusively held, remains with the courts'"); *Chicago, Burlington & Quincy Rd. Co. v. Winnett* (U. S. C. C. A.), 162 Fed. 242, 247 [to point that legislature may delegate power to fix rates upon a commission and that courts of equity will not interfere by injunction to control the exercise of this power in advance (citing also numerous other cases)].

When order of Interstate Commerce Commission fixing rates is invalid, see *Interstate Commerce Commission v. Lake Shore & Michigan S. Ry. Co.*, 134 Fed. 942, aff'd (mem.) 202 U. S. 613, 26 Sup. Ct. 766, 50 L. ed. 1171.

Neither court or commission has power to fix maximum rates. See *Interstate Commerce Commission v. East Tennessee V. & G. Ry. Co.*, 85 Fed. 107; *Interstate Commerce Commission v. Northeastern R. Co. of S. C.*, 83 Fed. 611, 27 C. C. A. 631.

¹¹ Syllabus in *Great Northern Ry. Co. v. Kalispell Lumber Co.*, 165 Fed. 25.

Commission may determine reasonableness or unreasonableness of rates. *Tift v. Southern Ry. Co.*, 138 Fed. 753, aff'd *Southern Ry. Co. v. Tift*, 148 Fed. 1021, 79 C. C. A. 536, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. ed. 1124.

for that would be depriving the carrier of its property without due process of law, and would also be taking its property for public use without just compensation in violation of the Fifth Amendment to the Constitution.¹² Again, Congress has conferred upon the Interstate Commerce Commission the power of determining whether, in given cases, the services rendered were like and contemporaneous, whether the respective traffic was of a like kind and whether the transportation was under substantially similar circumstances and conditions. If the commission has power of its own motion to promulgate general decrees or orders which thereby become rules of action to common carriers, such exertion of power must be confined to the obvious purposes and directions of the statute since Congress has not granted it legislative powers. In passing upon the questions arising under the statute the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to consider fully all the circumstances and conditions that reasonably apply to the situation, and in the exercise of its jurisdiction the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. Among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as well as in the case of traffic originating within the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes, are or are not undue and unjust the fair interests of the carrier companies and the welfare of

¹² *Missouri, Kansas & Texas Ry. Co. v. Interstate Commerce Commission* (U. S. C. C.), 164 Fed. 645. See also *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, 30 Chicago L. News, 243, 171 U. S. 361, 18 Sup. Ct. 88, 43 L. ed. 197.

the community which is to receive and consume the commodities are to be considered. If the commission instead of confining its action to redressing on complaint made by some particular person, corporation, firm, or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting or facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country. The mere fact that the disparity between through and local rates is considerable does not warrant the Circuit Court of Appeals in finding that such disparity constitutes an undue discrimination, especially if such disparity is not complained of by anyone affected thereby.¹³

§ 106a. Jurisdiction of Interstate Commerce Commission—Carrier's Discriminatory Regulations—Railroad Equipment—Coal Car Distribution.

The equipment of an interstate railroad, including cars for transportation of its own fuel are instruments of interstate commerce and subject to the control of the Interstate Commerce Commission. So the act to regulate commerce has delegated to said commission authority to consider, where complaint is made on that subject, the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage, as a means of prohibiting unjust preference or undue discrimination; and the commission¹⁴ has power to deal with preferential and discriminatory regulations of carriers as well as with rates; nor is it beyond the powers of said commission to require a railroad in distributing its coal cars to take into account its own fuel cars in order not to create a preference of the mine to which said cars are assigned

¹³ *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940.

¹⁴ Under § 15 of the act to regulate commerce as amended June 29, 1906, c. 3591, 34 Stat. 585.

over other mines. And even if commerce in regard to the purchase of coal at a mine on a railroad line by the railroad company which supplies its own cars may end there, the power to use the equipment of the railroad to move the coal is subject to the control of said commission in order to prevent discrimination against, or undue preference of, other miners and shippers of coal.¹⁵

§ 107. Power of State as to Railroad and Like Commissions.

A State may exercise through a board of commissioners such legislative control as may be necessary to protect the public against danger, injustice and oppression.¹⁶ The legislature may also, without delegating its lawmaking power, establish a commission with authority to fix reasonable rates and tariffs for railroads, prevent unjust discriminations and exercise reasonable supervision and control in other matters subject to the right of appeal to the courts, and such a statute is constitutional.¹⁷ A State statute may also constitutionally create a railroad commission and charge it with the duty of supervising railroads; and such an enactment is not necessarily void in its entirety because it is to some degree inconsistent and uncertain in its terms.¹⁸ So the creation of a board of railroad commissioners and the extent of its powers; what the route of railroad companies created by the State may be; and whether parallel and competing lines may consolidate, are all matters

¹⁵ *Interstate Commerce Commission v. Illinois Central Rd. Co.*, 215 U. S. 452, 30 Sup. Ct. —, 54 L. ed. —, followed in *Interstate Commerce Commission v. Chicago & Alton Rd. Co.*, 215 U. S. 479, 30 Sup. Ct. —, 54 L. ed. —, as to power, under the act to regulate commerce, of the commission to make reasonable arrangements for the distribution of coal cars to shippers including cars for the transportation of fuel purchased by the railroad company for its own use. See *Baltimore & Ohio Rd. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. ed. —, 30 Sup. Ct. —. See § 49, herein.

¹⁶ *New York & New Eng. Rd. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269.

¹⁷ *Express Co. (Atlantic Express Co.) v. Wilmington & Weldon Rd. Co.*, 111 N. C. 463, 16 S. E. 393.

¹⁸ *Railroad Commission Cases (Stone v. Farmers' Loan & Trust Co.)*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334.

will not be sustained as unconstitutional on the ground that thereby the independent tenure of the judiciary is interfered with.²³

§ 110. Jurisdiction and Power of Railroad and Like Commissions—Generally.

As the regulation of the business conducted by common carriers is one over which the legislature has full power to act, ample authority can by law be conferred upon a railroad and warehouse commission to call for information on any carrier, whether a natural or artificial person, resident or nonresident, carrying on business within the State, where such information is absolutely essential for the proper conduct of the carrier and the protection of the public.²⁴ Under a Georgia case a railroad company cannot be compelled by a railroad commission to contract for shipment of goods beyond its own line.²⁵ Under a North Carolina decision, a State statute²⁶ making it unlawful for a railroad to neglect to transport any goods received by it for a longer period than four days after the receipt thereof gives to the railroad four days' free time at the point of shipment. And a statute making it unlawful for any railroad to allow any goods to remain at any intermediate point for a longer period than forty-eight hours unless otherwise provided by the corporation commission, gives to the commission the right to fix the time allowed as free time for intermediate points and to make reasonable regulations as to the time of transit. But the corporation commission has no power to change the time allowed as

²³ *Caldwell (State ex rel. Caldwell) v. Wilson*, 121 N. C. 425, 61 Am. St. Rep. 672, 28 S. E. 554.

²⁴ *State ex rel. Railroad & Warehouse Commission v. Adams Express Co.*, 66 Minn. 271, 273, 38 L. R. A. 225, 68 N. W. 1085, per Collins, J.

²⁵ *State v. Wrightsville & T. Rd. Co.*, 104 Ga. 437, 30 S. E. 891.

As to power of railroad commission to relieve railroad company on application of operation of statutes relating to transportation of a particular commodity between certain points, see *Illinois Central Rd. Co. v. Commonwealth*, 23 Ky. L. Rep. 544, 63 S. W. 448. *Examine Siler v. Louisville & Nashville Rd. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. 451, considered under § 115, herein.

²⁶ *Laws N. C. 1903*, chap. 590.

free time at the point of shipment, nor to alter the penalties fixed for the violation of the statute.²⁷

§ 111. Same Subject.

Under an Oregon decision a legislative authority given to a railroad commission to examine into the affairs of railroads and report as to certain specific matters to the legislature, does not raise the presumption of an authority to adjust the same, even though authority is also conferred to hear complaints against such corporations by reason of acts done or omitted to be done by them.²⁸ In Wisconsin while the legislature cannot properly delegate authority to a commission to determine what power a corporation shall possess, still it may clothe a commission with authority to determine whether the facts exist rendering a corporation competent to exercise its corporate powers in a given case. A legislative grant of authority to a commission to determine whether a corporation may do a particular thing proposed by the latter to be done implies authority to determine corporate competency in that regard tested by the charter.²⁹ Under a Virginia decision where a choice of one of two methods is given to a railroad corporation of performing a charter duty, it is error for a State corporation commission to limit them to one of such methods in directing the performance of that duty.³⁰ Under a Texas decision the Constitution of that State³¹ em-

²⁷ *Summers v. Railroad*, 138 N. C. 295, 50 S. E. 714. The syllabus to this case in the *Southeastern Reporter* reads as follows: "Laws 1903, p. 999, c. 590, § 3, providing that it shall be unlawful for any railroad company to omit to transport any goods received by it for shipment for a longer period than four days after receipt thereof, unless otherwise agreed upon between the parties, or unless the same be destroyed, or to allow any such goods to remain at any intermediate point more than forty-eight hours, unless otherwise provided by the Corporation Commission, confers power on the commission to fix the time allowed as free time for intermediate points, and to make regulations as to the time of transit, but not to change the time allowed as free time at the point of shipment, nor to alter the penalties."

²⁸ *Oregon Railroad Comm'rs v. Oregon Rd. & Nav. Co.*, 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195.

²⁹ *State ex rel. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., v. Railroad Commission*, 137 Wis. 80, 117 N. W. 846.

³⁰ *Winchester & Strasburg Rd. Co. v. Commonwealth*, 106 Va. 264.

³¹ Article 10, § 2.

powers and directs the legislature to enact laws to "correct abuses" on the different railroads in this State, and this embraces the right and duty to pass laws for the correction of all abuses or improper uses of the franchises which had been or might be granted to railroads in this State, as well as all abuses connected with or growing out of the business transacted in the exercise of such franchises. The power was not limited to the correction of abuses in the rates of freight and passenger tariffs. The same construction and effect is to be given to the power to "correct abuses" conferred by the legislature on the railroad commission³² and the powers conferred thereby are not limited to regulation of freight and passenger tariffs. It seems that the power of the railroad commission to correct abuses extends only to such as are defined by law, and does not give authority to enact a law defining what is an abuse.³³ Under the English Regulation of Railways Act³⁴ railway commissioners have power to issue a writ of attachment or to impose a penalty not exceeding a certain sum for disobedience to their orders.³⁵

§ 112. Nature of Jurisdiction and Powers of Railroad Commissions.

The Railroad Commission of Mississippi is not a court but a mere administrative agency of the State.³⁶ The North Carolina Railroad Commission established by the act of 1891 of that State is purely of legislative origin, and is an administrative and

³² Rev. Stats., Arts. 4562-4569.

³³ Syllabus in *Railroad Commission v. Houston & Texas Cent. Ry. Co.*, 90 Tex. 340, 38 S. W. 750.

As to effect of order of railroad commission compelling carriers to receive loaded cars for transportation over its own line, to haul the same over its own line and its junction with the next connecting line and deliver them for transportation to a connecting line, without compensation for loss or delivery of cars when beyond its own control, see *Gulf, Colorado & Santa Fe Ry. Co. v. State* (Tex. Civ. App., 1909), 120 S. W. 1028.

³⁴ Of 1873, § 6.

³⁵ So held by Queen's Bench Division of the High Court of Justice, *Chat-terly Iron Co. v. North Staffordshire Ry. Co.* (1878), 3 Ry. & Can. Cas. 238.

³⁶ *Mississippi Railroad Commission v. Illinois Central Rd. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209, aff'g 138 Fed. 327.

*not a judicial court, and though, by subsequent statute, the commission was made a court of record, the object and effect of such amending statute was simply to give authority to its records and proceedings and added nothing to its powers.*³⁷ Whether or not certain provisions of the Texas statute of 1891, establishing a railroad commission with power to classify and regulate rates, are valid, the remainder of that act is a valid and constitutional exercise of the State sovereignty, and the commission created thereby is an administrative board, created for carrying into effect the will of the State, as expressed by its legislation.³⁸ It is held that the State Corporation Commission of Virginia acts judicially in determining the liability of a corporation for a fine or forfeiture imposed by a statute which such commission is required to enforce, and it may declare the act imposing such fine or forfeiture unconstitutional.³⁹

§ 113. Jurisdiction of Railroad Commissions—Rates.

Under a State statute the duty of enforcing such rates as it may fix may be vested in a railroad commission.⁴⁰ The author-

³⁷ *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554. See *Pate (State ex rel. Board of Rd. Comm'rs) v. Wilmington & Weldon Rd. Co.*, 122 N. C. 877, 29 S. E. 334, 11 Am. & Eng. R. Cas. (N. S.) 671, considered under § 140, *herein*.

³⁸ *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 352, 38 L. ed. 1014, 14 Sup. Ct. 1047, followed *Id.*, 154 U. S. 420, 38 L. ed. 1031, 14 Sup. Ct. 1062.

³⁹ *Commonwealth v. Atlantic Coast Line Ry. Co.*, 106 Va. 61. Mr. Justice Holmes, in his opinion in *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 224, 53 L. ed. 150, 29 Sup. Ct. 67, remarks that the Virginia State corporation commission exercises among its duties "the authority of the State to supervise, regulate and control public service corporations, and to that end, as is said by the Supreme Court of Virginia * * * it has been clothed with legislative, judicial and extensive powers. *Norfolk & Portsmouth Belt Line Rd. Co. v. Commonwealth*, 103 Va. 289, 294."

⁴⁰ *McChord v. Louisville & N. R. Co.*, 183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. 165.

Duty of railroad commissioners to make rates relates to the subjects of transportation rather than to particular persons or corporations. *State v. Atlantic Coast Line Rd. Co. (Fla.)*, 40 So. 875.

As to delegation to railroad commissioners as to mileage tickets on railroads, when valid, see *Attorney General v. Old Colony Rd. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 1112.

When railroad commission no jurisdiction to compel railroad to reinstate

ity vested in a railroad and warehouse commission to determine, in the exercise of their discretion and judgment what are equal and reasonable rates and fares for the transportation of persons former lower competitive rate, see *Edson v. Southern Pacific Co.*, 133 Cal. 25, 65 Pac. 15.

See the following English decisions:

Jurisdiction of railway commissioners to require railway company to distinguish in rate books *quantum* for conveyance, etc., under Regulation of Railways Act, 1873 (36 & 37 Vict., chap. 48), s. 14. See *Pickford's, Limited, v. London & Northwestern Ry. Co.* (1905), 12 Ry. & Can. Traff. Cas. 154.

Jurisdiction of railway commissioners; whether railway company can be called upon to justify increase of rates, lowered but reraised under Railway & Can. Traff. Act, 1894 (57 & 38 Vict., chap. 54), s. 1, and Act, 1888 (51 & 52 Vict., chap. 25), s. 29. See *Millon & Askam Hematic Iron Co. v. Furness Ry.*, 12 Ry. & Can. Traff. Cas. 1. Examine *Rishworth v. North-eastern Ry.*, 12 Ry. & Can. Traff. Cas. 34.

Jurisdiction of railway commissioners to rescind a through rate; reasonable facility, see *Great Northern Ry. Co. (Ireland) v. Donegal Ry. Co.* (1901), 11 Ry. & Can. Traff. Cas. 47; Ry. & Canal Traff. Act, 1854 (17 & 18 Vict., chap. 31), s. 2, and Act, 1888 (51 & 52 Vict., chap. 25), ss. 9, 25.

Jurisdiction of railway commissioners as to proposed reduction of rate; creation of undue preference, see *Taff Vale Ry. Co., In re* (1900), 11 Ry. & Can. Traff. Cas. 89 [application to commissioners under Ry. & Can. Traff. Act, 1888 (51 & 52 Vict., chap. 25), s. 29, subs. 3].

Jurisdiction of railway commissioners to grant through booking without a through rate, as reasonable facilities, see *Didcot, Newbury & Southampton Ry. Co. v. Great Western Ry. Co.*, etc. (1896), 10 Ry. & Can. Traff. Cas. 1, 9, under Ry. & Can. Traff. Act, 1854 (17 & 18 Vict., chap. 31), s. 2, and Act, 1888 (51 & 52 Vict., chap. 25), s. 25. As to jurisdiction of railway commissioners to hear and determine complaint as to unreasonableness of increased rate or charge for cartage, see *Mansion House Association on Ry. & Canal Traffic, etc., v. London & Northwestern Ry. Co.*, 9 Ry. & Can. Traff. Cas. (1896), 174, application under Ry. & Can. Traff. Act, 1894 (57 & 58 Vict., chap. 54), s. 1.

Jurisdiction of railway commissioners; application for order enjoining railway company to desist charging passengers fares in excess of the sums stated in the Company's Act, 1847 (10 & 11 Vict., chap. 226, s. 49). Complaint was founded on obligation imposed on railway companies by the English Ry. & Can. Traff. Act, 1854, s. 2, to grant "all reasonable facilities." See *Brown v. Great Western Ry. Co.* (1881), 3 Ry. & Can. Cas. 523. See also *Chatterly Iron Co. v. North Staffordshire Ry. Co.* (1878), 3 Ry. & Can. Cas. 238 (illegal and excessive charges for conveyance of traffic does not afford all reasonable facilities within English Ry. & Can. Traff. Act, 1854, s. 2); *Aberdeen Commercial Co., etc., v. Great North of Scotland Ry. Co.* (1878), 3 Ry. & Can. Traff. Cas. 205.

and property by a railway company is not a delegation of legislative power.⁴¹

The act of the legislature of Minnesota, creating a railroad commission, is not unconstitutional in assuming to establish joint through rates or traffic over the lines of independent connecting railroads, and apportioning and dividing the joint earnings. Such a commission has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road or for a joint action between railroads in the transportation of persons and property in which the public is indirectly concerned. And whether or not connecting roads may be compelled to enter into contracts as between themselves, and establish joint rates, it is none the less true that where a joint tariff between two or more roads has been agreed upon such tariff is as much within the control of the legislature as if it related to transportation over a single line. The presumption is that the rates fixed by the commission are reasonable, and the burden of proof is upon the railroad company to show the contrary. A tariff fixed by the commission for coal in carload lots is not proved to be unreasonable, by showing that if such tariff were applied to all freight the road would not pay its operating expenses, since it might well be that the existing rates upon other merchandise, which were not disturbed by the commission, might be sufficient to earn a large profit to the company, though it might earn little or nothing upon coal in carload lots.⁴²

§ 114. Same Subject.

An act of incorporation, which confers upon the directors of a railroad company the power to make by-laws, rules and regulations touching the disposition and management of the company's property and all matters appertaining to its con-

^a *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 38 Minn. 281, 37 N. W. 72.

^a *Minneapolis & St. Louis Ry. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151.

cerns, confers no right which is violated by the creation of a State railroad commission, charged with the general duty of preventing the exaction of unreasonable or discriminating the rates upon transportation done within the limits of the State, and with the enforcement of reasonable police regulations for the comfort, convenience and safety of travelers and persons doing business with the company within the State.⁴³ Under a Massachusetts decision the authority of the board of railroad commissioners⁴⁴ is not to consider the general subject of rates, but "to ascertain at what rates facilities for the carriage of milk under contract or in large quantities are furnished by the railroad corporation," and to compare them with the tariff for the carriage of milk by the can, to fix rates by the can "fairly proportionate with such contract or large quantity rates." The order when made is to have the force and effect of a criminal statute which calls for strictness and regularity of proceedings under it.⁴⁵ The creation of a railroad or corporation commission by statute of a State may operate as a repeal of a statute empowering railroads to fix passenger rates, or a statute giving such authority to railroads may repeal an enactment creating such commission or extending its powers.⁴⁶

§ 115. When Railroad Commission Is Without Jurisdiction—Rates.

Jurisdiction so extensive as to place in the hands of a railroad commission power to make general maximum rates for all commodities between all points in a State is not to be implied, but must be given in language admitting no other reasonable construction; and the fact that the legislature of a State gives to such a commission no power to raise rates, but only power to reduce rates found to be exorbitant after hearing on specific complaint is an argument against construing the statute so as

⁴³ *Railroad Commission Cases* (*Stone v. Farmers' Loan & Trust Co.*), 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. 334.

⁴⁴ Under Pub. Stat., chap. 112, §§ 192-194.

⁴⁵ *Syllabus in Littlefield v. Fitchburg Rd. Co.*, 158 Mass. 1, 32 N. E. 859.

⁴⁶ *Southern Ry. Co. v. McNeill*, 155 Fed. 756. See *Matthews v. Board of Corporation Comm'rs of N. C.*, 97 Fed. 400.

to give the commission power to fix maximum rates on all commodities. Again, where such commission after hearing on specific complaint as to a rate on a particular commodity makes a general rate tariff for maximum rates on all commodities which is beyond its statutory power, the whole tariff falls, and the rate on the tariff on the particular commodity will not be separately sustained. Therefore, where a State railroad commission having, after a hearing on complaints that the rates on lumber were too high, attempted to impose a general maximum intrastate tariff schedule, and the statute creating the commission not giving it authority to make such a schedule, it was held by the Federal Supreme Court, without deciding whether either the statute or the order deprived the railroad companies of their property without due process of law, that the entire schedule of rates must fall as being beyond the jurisdiction of the commission to establish in that manner.⁴⁷ So a State constitutional provision regulating rates or compensation for long and short hauls with a proviso authorizing the railroad commission upon application to prescribe the extent of relief which might be granted or carried from the operation of the provision is invalid where it affects or is made applicable to interstate commerce.⁴⁸ A statute creating a railroad and

⁴⁷ *Siler v. Louisville & Nashville Rd. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. 451. The jurisdiction of the United States Circuit Court, also the rule of the Federal Supreme Court as to constitutional questions not decided were involved as noted elsewhere herein. The Kentucky railroad commission law was the one under discussion. The bill was by a railroad company in the Federal Circuit Court for the Eastern District of Kentucky to enjoin enforcement of order of the commission providing maximum rates on transportation of all commodities upon railroads to and from all points within the State. *Examine Illinois Central Rd. Co. v. Commonwealth*, 23 Ky. L. Rep. 544, 63 S. W. 448.

⁴⁸ *Louisville & Nashville Rd. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. ed. 416. The section (Const. Ky., § 218) reads as follows: "It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or

warehouse commission is unconstitutional where it makes the rates fixed by such commission final and conclusive and deprives a railroad company of its right to judicial investigation by due process of law.⁴⁹ Again, a legislative authority given to a board of railroad commissioners, under the act creating it, to examine into the affairs of railroad companies doing business in the State and make reports to the legislature with certain suggestions as to classification and rate changes in freights or fares without any express delegation of authority to regulate or determine the unreasonableness of such freight rates, does not vest jurisdiction in the commission to require excessive freight charges to be refunded.⁵⁰

§ 116. Jurisdiction of Railroad Commissions—Increase of Capital Stock of Corporations.

Under a Minnesota decision the legislature may pass a statute providing generally for what purposes and upon what terms, conditions and limitations an increase of capital stock may be made, and it may confer upon a commission (a railroad and warehouse commission) the administrative duty of supervising any proposed increase of stock. It may also delegate to the commission the duty of finding the facts in each particular case, and empower and require it to allow the proposed increase where the facts exist which bring the case within the statute. But the legislature cannot, by any statute, authorize such commission in its judgment to allow an increase of a corporation's capital stock for such purposes and on such condi-

corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, that upon application to the Railroad Commission, such common carrier, or person or corporation, owning a railroad in this State, may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property, and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section."

⁴⁹ *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, 702.

⁵⁰ *Oregon Railroad Comm'rs v. Oregon Rd. & Nav. Co.*, 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195.

tions or terms as it shall or may deem advisable, or in its discretion to refuse it, as such an attempt to confer authority would be a delegation of legislative power. And where the statute does delegate to a commission such legislative power, it is unconstitutional and void; a distinction exists between the delegation of legislative powers and administrative duties; that between the delegation of power to make a law, which involves a discretion as to which it shall be, and the conferring an authority or discretion to be exercised under and in pursuance of the law.⁵¹ The Railroad Commission of Wisconsin also has authority to pass upon the competency of a railroad corporation to increase its capital stock and to refuse permission in that regard in case the articles of incorporation shall not have been so broadened as to cover the subject by a valid amendment which requires a public record of the change to be made in the office of the Secretary of State and compliance with the conditions precedent thereto in respect to the payment of fees.⁵²

⁵¹ *State v. Great Northern Ry. Co.*, 100 Minn. 445, 10 L. R. A. (N. S.) 250, 111 N. W. 289.

⁵² *State ex rel. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Railroad Commission*, 137 Wis. 80, 117 N. W. 846. A case of mandamus proceedings to require the State railroad commission to furnish relator with a certificate of authority to issue stock in addition to that originally authorized by the articles of association. There was involved the question of the scope of the commissioners' power relative to the issue of stock, stock certificates, bonds, or other evidences of indebtedness by railroad corporations. The key to the law " (statute) "is contained in the declaration, in effect, that no corporate stock, stock certificates, bonds, or other evidences of indebtedness shall be issued by any public service corporation except upon the authority of the commission first obtained. That, of course, does not imply authority for the commission to interfere with the mere business policy of a corporation within its corporate powers, which * * * would be an illegitimate delegation of authority. *State v. Great Northern Ry. Co.*, 100 Minn. 445, 111 N. W. 289. It does unmistakably show a purpose to lodge in the railroad commission power to pass upon questions of fact involved in whether a public service corporation, desiring to do any of the things mentioned is competent in that regard, having reference to the written law on the subject. The seat of original power is in the legislature; it cannot legitimately delegate it. It can properly clothe a commission with capacity to determine whether corporate rights created by the legislature are exercisable, that depending upon the existence of facts satisfying legal con-

§ 117. Jurisdiction of Public Service Commission—Issue of Stocks and Bonds by Corporations.

The paramount purpose of the enactment of the Public Service Commissions Law of New York was the protection and enforcement of the rights of the public. One of the legislative purposes in the enactment of the statute was to prevent the issue of stocks and bonds by public service corporations, if, upon an investigation of the facts, it was found that they were not for the purposes of the corporation enumerated by the statute and reasonably required therefor. It was not, however, designed to make the commissioners the financial managers of the corporation or to empower them to substitute their judgment for that of the board of directors or stockholders as to the wisdom of a transaction. While the ownership of property ordinarily carries with it the right of management, the duty devolves upon the owner to so manage as not to have it become a nuisance or unnecessarily infringe upon the rights of others. It was, therefore, evidently the legislative intent in the enactment of this provision that the commissioners should have supervision over the issuing of long-time bonds by the public service corporations enumerated in § 55 of the Public Service Commission Law to the extent of determining whether they were issued under and in conformity with the provisions of the statute for the purposes mentioned therein, or whether they were issued for the discharge of the actual and not the fictitious debts of the company, or whether they were issued for the refunding of its actual obligations and not for the inflation of its stocks or bonds. Beyond this the power of the commissioners does not extend, unless it may pertain to the power to determine whether an obligation should be classified as operating expenses and as to whether such expenses should be paid

ditions precedent in that regard, and give to the corporation invoking its jurisdiction evidences of its determination. It would be highly unreasonable to conclude that the legislature purposed empowering the commission to authorize the doing of the things mentioned in the act in any other sense. The grant of power to authorize suggests by necessary implication the grant of power to pass upon the underlying questions. The former includes the latter." *Id.*, 86, 87, per Marshall, J.

by obligations running beyond a year. The Public Service Commission Law ⁵³ authorizes a common carrier, upon securing from the proper public service commission an order so to do, to issue stocks, bonds, notes or other evidence of indebtedness, among other things, for the discharge or lawful refunding of its obligations, and authorizes such commission to investigate for the purpose of enabling it to determine whether it should grant such an order. The relator made an application for an order to issue bonds secured by a mortgage already given for the purpose of paying outstanding indebtedness, the amount and validity of which indebtedness was not questioned. The indebtedness had accrued by the purchase of securities, which transaction the public service commission regarded as an unfortunate one for the company; that it had paid more than the securities were worth and that the property so acquired had not been included in the mortgage. Although it conceded that the purchase was lawful and that the notes were valid obligations of the company, the commission withheld consent to the issuing of the bonds. Relator also applied for leave to issue bonds to pay indebtedness incurred for the acquisition of other property, which was refused, apparently upon the ground that the lands so acquired should have been mortgaged for the purpose of paying such obligations. It was held that the application of the relator to issue the bonds should have been granted.⁵⁴ The decision of the court below in this case was as follows: § 55 of the Public Service Commission Law, requiring public service corporations to obtain an order from the Public Service Commissioners authorizing an issue of bonds and determining the amount thereof, was designed to protect the public and the public interests. The commission is not justified in withholding its consent unless the proposed bond issue is in conflict with public interest. Otherwise the right of such corporation to manage its own affairs is protected by the Constitution. The Public Service Commission, therefore, should not refuse to grant an order authorizing a corpora-

⁵³ Laws 1907, chap. 429, § 55.

⁵⁴ *People ex rel. Delaware & Hudson Co. v. Stevens*, 197 N. Y. 1.

tion owning and operating both railroads and coal mines to issue bonds secured only by a mortgage on its railroad property, but not covering its coal mines, for the purpose of refunding outstanding obligations where it does not appear that the public interests are in any way imperiled.⁵⁵

§ 118. Jurisdiction of Railroad Commissions—Stopping Interstate Trains.⁵⁶

While a State railroad commission may, in the absence of congressional legislation, order a railroad company to stop interstate trains at stations where there is only an incidental interference with interstate commerce, based on a legal exercise of the police power of the State exerted to secure proper facilities for the citizens of the State, still, where the railroad company has furnished all proper and reasonable facilities, such an order is an improper and illegal interference with interstate commerce and void as a violation of the commerce clause of the Constitution.⁵⁷ “The matter of the validity of statutes, directing railroad companies to stop certain of their trains at stations named, has been before this court several times, and the result of its holdings is: That a statute of Illinois, which required the Illinois Central Railroad to stop its fast mail train from Chicago to New Orleans at Cairo, in the State of Illinois,

⁵⁵ *People ex rel. Delaware & Hudson Co. v. Stevens*, 134 App. Div. 99.

As presenting the view taken of this case, as set forth in the syllabus thereto, in 118 N. Y. Supp. 960, we append that syllabus as follows: The Public Service Commission Law, Laws 1907, p. 921, chap. 429, § 55, providing for the approval by the commission of the issuance of bonds by public service corporations, is valid only as an exercise of the right of the State to protect the public and the public interests, and the commission may not withhold its approval unless it clearly appears that the act of the corporation in the management of its affairs is in conflict with the public interests. And where a corporation organized to own and operate railroads and coal lands proposed to issue bonds secured by a mortgage of railroad property alone and the public interests would not be imperiled thereby, the Public Service Commission must approve the issue as required by Public Service Commission Law, Laws 1907, p. 921, chap. 429, § 55, and they could not insist that the mortgage should include coal lands as well.

⁵⁶ See § 50, herein.

⁵⁷ *Mississippi Railroad Commission v. Illinois Central Rd Co.*, 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. 90, aff'g 138 Fed. 327.

which was a county seat, was unconstitutional if the company had made adequate accommodation by other trains for interstate passengers to and from Cairo.⁵⁸ That a statute which required every railroad corporation to stop all regular passenger trains, running wholly within the State, at its stations at all

■ *Illinois Central Rd. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. 1096. In this case the act of Congress of Sept. 20, 1850, c. 61, granted a right of way and sections of the public lands, to the State of Illinois, and to States south of the Ohio River, to and in the construction of a railroad connecting the waters of the Great Lakes with those of the Gulf of Mexico, and over which the mails of the United States should be carried. The State of Illinois accepted the act, and incorporated the Illinois Central Railroad Company, for the purpose of constructing a railroad with a southern terminus described as "a point at the City of Cairo." The company accordingly constructed and maintained its railroad to a station in Cairo, very near the junction of the Ohio and Mississippi Rivers; but afterwards, in accordance with statutes of the United States and of the State of Illinois, connected its railroad with a railroad bridge built across the Ohio River opposite a part of Cairo farther from the mouth of that river; and put on a fast mail train carrying interstate passengers and the United States mails from Chicago to New Orleans, which ran through the city of Cairo, but did not go to the station in that city, and could not have done so without leaving the through route at a point three and a half miles from the station and coming back to the same point; but the company made adequate accommodation by other trains for interstate passengers to and from Cairo. Cairo was a county seat. It was held that a statute of Illinois, requiring railroad companies to stop their trains at county seats long enough to receive and let off passengers with safety, and construed by the Supreme Court of the State to require the fast mail train of this company to be run to and stopped at the station in Cairo, was, to that extent, an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States, cited in *Houston & Texas Central R. Co. v. Mayes*, 201 U. S. 321, 329, 50 L. ed. 772, 26 Sup. Ct. 491 (case of requirement that railroad furnish certain number of cars on specified day to transport merchandise to another State; held not within police power, and in violation of commerce clause of Federal Constitution); *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Illinois*, 177 U. S. 514, 518, 519, 20 Sup. Ct. 722, 44 L. ed. 868 (considered in note below); *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, 688, 19 Sup. Ct. 565, 43 L. ed. 858 [reversing *Smith v. Lake Shore & Michigan Southern Ry. Co.*, 114 Mich. 460, 72 N. W. 328, 4 Det. Leg. N. 662, 8 Am. & Eng. R. Cas. (N. S.) 496], a case of mileages ticket; constitutional law and State legislature regulation of railroads; *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 303, 306, and in dissenting opinion, 321, 43 L. ed. 702, 19 Sup. Ct. 465 (considered in note 60, below), distinguished in *Gladson v. Minnesota*, 166 U. S. 427, 431 (considered in note 59, below).

county seats, was a reasonable exercise of the police power of the State, where the statute did not apply to railroad trains entering the State from any other State, or transcontinental trains of any railroad.⁵⁹ A statute relating to railroad companies which provided that a company should cause three of its trains each way, if so many were run daily, Sundays excepted, to stop at a station containing over three thousand inhabitants, was valid in the absence of legislation by Congress on the subject;⁶⁰ and also a State statute which required all regular passenger trains to stop at county seats was invalid, when applied to an interstate train, intended only for through passengers from St. Louis to New York, when it appeared that the railroad company furnished sufficient trains to accommodate all the local and through business in the State, and where such trains stopped at county seats.⁶¹ * * * Upon the

⁵⁹ *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. 627, holding also that such a statute does not take property of the company without due process of law; nor does it, as applied to a train connecting with a train of the same company running into another State, and carrying some interstate passengers and the United States mail, unconstitutionally interfere with interstate commerce, or with the transportation of the mails of the United States.

⁶⁰ *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702, under an Ohio statute providing as stated in the text and also that: "If a company, or any agent or employé thereof, violate or cause or permit to be violated, this provision, such company, agent or employé shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the State, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county; and in all cases in which a forfeiture occurs under the provisions of this section, the company whose agent or employé caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held, *prima facie*, to have caused the violation." This statute was held not to be, in the absence of legislation by Congress on the subject, repugnant to the Constitution of the United States, when applied to interstate trains carrying interstate commerce through the State of Ohio on the Lake Shore & Michigan Southern Railway.

⁶¹ *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. 772; four regular passenger trains per day, each way, were furnished by the railroad company, which were sufficient to accommodate all the local and through business, and all such trains

principles decided in these cases, a State railroad commission has the right, under a State statute, so far as railroads are concerned, to compel a railroad company to stop its trains under the circumstances already referred to, and it may order the stoppage of such trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through interstate train actually running and compel it to stop at a locality named. In such case in the absence of congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right; but if the company has furnished all such proper and reasonable accommodation to the locality as fairly may be demanded, taking into consideration the fact, if it be one, that the locality is a county seat, and the amount and character of the business done, then any interference with the company (either directly by statute, or by a railroad commission acting under authority of a statute) by causing its interstate trains to stop in a particular locality in the State, is an improper and illegal interference with the rights of the railroad company, and a violation of the commerce clause of the Constitution. In reviewing statutes of this nature, and also orders made by a State railroad commission, it frequently becomes necessary to examine the facts upon which they rest and to determine from such examination whether there has been an unconstitutional exercise of power and an illegal interference by the State or its commission with the interstate commerce of the railroad. Whether there has or has not been such an interference is a question of law arising from the facts."⁶²

stopped at county seats. It was also held that while railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, they have the legal right, after all these local conditions have been met, to adopt special provisions for through traffic, and legislative interference therewith is an infringement upon the clause of the Constitution which requires that commerce shall be free and unobstructed.

⁶² *Mississippi Railroad Commission v. Illinois Central Rd. Co.*, 203 U. S. 335, 343, 344, 27 Sup. Ct. 90, per Mr. Justice Peckham; case affirms 138 Fed. 327.

§ 119. Jurisdiction of Railroad Commissions—Interstate Commerce—Delivery of Cars—Train Connections.

While a State in the exercise of its police power may confer power on an administrative agency to make reasonable regulations as to the place, time and manner of delivery of merchandise moving in channels of interstate commerce, any regulation which directly burdens interstate commerce is a regulation thereof and repugnant to the Federal Constitution and so held that an order of a North Carolina corporation commission requiring a railway company to deliver cars from another State to the consignee on a private siding beyond its own right of way was a burden on interstate commerce and void, but it was a question whether such an order applicable solely to State business would be repugnant to the due process clause of the Constitution.⁶³ A State railroad commission may require a railroad company to so arrange its schedule as to furnish transportation between two points so as to make connection with through trains where such order is not so arbitrary or unreasonable as to transcend the limits of regulation and is not in effect either a denial of due process of law or a deprivation of the

⁶³ *McNeill v. Southern Railway Co.*, 202 U. S. 543, 30 L. ed. 1143, 26 Sup. Ct. 722.

Jurisdiction of railway commissioners as to traffic; complaint under Railway and Canal Traffic Act, 1888 (51 & 52 Vict., chap. 25), s. 9, subs. (a) (c); also conditions precedent to jurisdiction; see *Great Northern Ry. Co. v. Great Central Ry. Co.* (1899), 10 Ry. & Can. Traff. Cas. 266.

Jurisdiction of railway commission as to "facilities" for receiving, forwarding and delivering traffic; to erect or alter stations or other structural works; case of demurrer to a prohibition issued at instance of the railway company to restrain the railway commissioners from proceeding to make certain orders which they had announced their intention to make under the English Act of 1873 (36 & 37 Vict., chap. 48), the act by which the commissioners were appointed to carry into effect the Railway and Canal Traffic Act, 1854 (17 & 18 Vict., chap. 31), as amended and enlarged by that act; see (*Hastings Case*) *Southeastern Ry. Co. v. Railway Comm'rs*, etc. (1881), 3 Ry. & Can. Cas. 464.

Court of Railway and Canal Commission: jurisdiction of to order railway company to deliver traffic at a private siding as part of a "railway"; under Railway and Canal Traffic Act, 1854 (17 & 18 Vict., chap. 31), ss. 1, 2. See *Cowan & Sons v. North British Ry. Co.* (1901), 11 Ry. & Can. Traff. Cas. 96. Held by a majority of seven judges of Court of Session.

equal protection of the laws or a taking of property without compensation. It is also within the power of such commission to compel a railroad company to make reasonable connections with other roads so as to promote the convenience of the traveling public, and an order requiring the running of an additional train for that purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company.⁶⁴

§ 120. Jurisdiction of Railroad Commissions—Railroad Stations—Other Facilities—Obligation of Contract—Due Process of Law.

While a State statute, providing for the abandonment of railroad stations, may authorize railroad commissioners to consent, or to refuse to consent, to the abandonment of an existing railroad station, still it confers upon them no authority to bind the State by contract not to exercise its legislative power as to the establishment of such stations, so that a subsequent enactment of the legislature establishing a depot at a certain place does not impair the obligation of any contract between the State and a railroad corporation.⁶⁵ The general laws of Minnesota of 1901⁶⁶ requiring the erection and maintenance of depots by railroad companies on the order of the railroad and warehouse commission under the conditions therein stated in that act, does not deny a railroad company the right to reasonably manage or control property or arbitrarily take its property without its consent, or without compensation or due process of law, and is not repugnant to the Constitution of the United States.⁶⁷ Under a Texas decision an action was

⁶⁴ *Atlantic Coast Line Rd. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 51 L. ed. 33, 27 Sup. Ct. 585. .*Examine Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. ed. 186, rev'g 18 Hawaii, 553.

⁶⁵ *Railroad Company v. Hammersley*, 104 U. S. 1, 26 L. ed. 629.

⁶⁶ Chapter 270, April 13, 1901.

⁶⁷ *Minneapolis & St. Louis Ry. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 42 Sup. Ct. 396.

Whether railway commission has jurisdiction to order water-closets to

missioners appointed by the court. A statute, however, which vests a railroad commission with power to fix the proportion of the expense of one railroad crossing another, at a grade crossing, does not constitute a delegation of legislative power or vest the commission with judicial power.⁷¹ But even though a highway crossing is dangerous as well as another one passed over by many trespassers only, still a lawful crossing cannot be abolished by railroad commissioners and a grade crossing substituted by them at a place about midway between the others.⁷² Again, the police power of a State does not empower a railroad commission to apportion or distribute the burden of expense of a railroad crossing between a railroad company and an older road which it seeks to cross, where the latter has acquired vested rights under a statute precluding such charge even though a later enactment authorizes such commissioners to fix the proportion of the expense of originally constructing, operating and maintaining such crossing and of any protective appliances prescribed by them and of operating and maintaining the same and that the same shall be paid by the owners of such tracks respectively; such a construction of the later statute so allowing the commission to so apportion the cost of crossing between the roads without a remedy for damages to the older road would be unconstitutional and not a reasonable exercise of the police power, as it would amount to the taking of the older railroad's property and transferring it to the junior road without compensation.⁷³ Under a New York decision the Public Service Commission has full power and jurisdiction to do whatever the

⁷¹ *State ex rel. Northern Pac. Ry. Co. v. Railroad Commission* (Wis., 1909), 121 N. W. 919 (Laws Wis., 1907, pp. 439-447, chap. 454), citing *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. ed. 523; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Railroad Commission*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821; *Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529; *Nash v. Fries*, 129 Wis. 120, 108 N. W. 210; *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112.

⁷² *Fairfield's Appeal*, 57 Conn. 167, 17 Atl. 764.

⁷³ *State ex rel. Northern Pac. Ry. Co. v. Railroad Commission* (Wis., 1909), 121 N. W. 919.

former board of railroad commissioners might have done under the grade crossing provisions of the railroad law, even if the matter was pending and undetermined before the railroad commissioners when the jurisdiction of that board was transferred to the Public Service Commission. The former board of railroad commissioners had power to reinvestigate, hear and determine on new testimony matters previously decided by that board concerning grade crossings, and had the right to change its decision on all matters involved whether of substance or detail. The Public Service Commission, therefore, possessing all the powers of the former board can rehear and redetermine on new evidence the proper method of constructing a grade crossing although an application for the reconsideration of a prior determination on the matter was pending undetermined when the board of railroad commissioners was abolished, therefore the public service commission is not barred from reconsidering a prior determination of the railroad commissioners merely because that decision had been sustained on appeal.⁷⁴

§ 122. Jurisdiction of Railroad Commissions—Telegraph Companies—Installing Telephone.

The North Carolina Railroad Commission, under the statute of 1891 of that State establishing such commission, was given no authority to direct a telegraph company to open, for commercial messages, offices at which only its business or that of a railroad company with which it has intimate relations, is transacted. Whether it is the duty of such company to take such messages may be tested in a civil action after the tender of a message.⁷⁵ And in the same State telegraphic messages transmitted by a company from and to points in a State, although traversing another point in the route, do not constitute interstate commerce, and are subject to the tariff regulation of the commission.⁷⁶ And where a railroad com-

⁷⁴ *People ex rel. Town of West Seneca v. Public Service Commission*, 130 App. Div. 335.

⁷⁵ *Railroad Commissioners (State ex rel. Railroad Commissioners) v. Western Union Teleg. Co.*, 113 N. C. 213, 18 S. E. 389.

⁷⁶ *Railroad Commissioners (State ex rel. Railroad Commissioners) v. West-*

mission has statutory authority to make rates for the transmission of messages by any telegraph line or lines within the State, it has the incidental power, subject to the right of appeal, to ascertain what particular corporation is in the control of or operates any of such lines in the State, in order that it may exercise its authority to fix rates, as well as to ascertain against whom to proceed for a violation.⁷⁷ Again, the railroad commission in that State has no power to prescribe rules or regulations for telegraph companies other than those directed by statute to make rates of charges for the transportation of messages by telegraph lines for doing business in the State of the statutory enactment, and for a violation of the rules prescribed by the commission fixing rates for messages the latter may on service of notice of the violation and on hearing direct full compensation to the injured party, enforceable by a civil action.⁷⁸ With only one railroad station in a town having one telephone exchange, and an inland town about six miles distant with about three hundred population having a telephone exchange, said town receiving all of its freight by the way of said station and a telephone installed and maintained in said station, connected with both exchanges, it appearing that the installing and maintaining of such telephone would be to the convenience of the patrons of said railroad station, the order of the corporation commission requiring a telephone to be installed and maintained in said station will not be disturbed by the court. *Prima facie* just, reasonable, and correct,⁷⁹ is a presumption arising upon the finding of the corporation commission that the order based upon such facts is presumed on appeal by the court to be just, reasonable, and correct, subject to be overcome or rebutted by the facts in the record, as weighed and found by the court in reviewing the same.⁸⁰

ern Union Teleg. Co., 113 N. C. 213, 18 S. E. 389; compare *Leavell v. Western Union Teleg. Co.*, 116 N. C. 211, 21 S. E. 391.

⁷⁷ *Railroad Commissioners (State ex rel. Railroad Commissioners) v. Western Union Teleg. Co.*, 113 N. C. 213, 18 S. E. 389.

⁷⁸ *Mayo v. Western Union Teleg. Co.*, 112 N. C. 343, 16 S. E. 1006.

⁷⁹ Section 22, Art. 9, § 235, Burns's ed.; Snyder's ed., p. 259, of the Constitution.

⁸⁰ *Atchison, Topeka & Santa Fe Ry. Co. v. State (Okla., 1909)*, 100 Pac. 11.

CHAPTER X

JURISDICTION OF COURTS OVER CORPORATION SUPERVISORY COMMISSIONS, ETC.

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| <p>123. Jurisdiction of Boards of Equalization — Conclusiveness of Decisions of—Review by Courts.</p> <p>124. Jurisdiction of Courts—Certiorari to Review Assessment — Special Franchise Tax—Requirements as to Return by Tax Commissioners.</p> <p>125. Board of Harbor Commissioners—Jurisdiction of Courts.</p> <p>126. Resolution of City Council and Direction to City Solicitor to Enforce Same Against Street Railway—Obligation of Contract—Jurisdiction of Federal Circuit Court—Injunction.</p> <p>127. Condemnation Proceedings—Commissioners — State Crossing Board—Jurisdiction of Courts—Waiver.</p> <p>128. Jurisdiction of Courts—Insurance—State Auditor—Superintendent of Insurance.</p> <p>129. Jurisdiction of Officers of Land Department—Control and Supervision of by Courts — Mandamus — Injunction.</p> <p>130. Same Subject—Railroads—Right of Way.</p> <p>131. Jurisdiction of Courts in Respect to Interstate Commerce Commission—Generally.</p> | <p>132. Jurisdiction of Federal Courts in Respect to Interstate Commerce Commission — Rates.</p> <p>133. Same Subject.</p> <p>134. Same Subject—Injunction—Where Redress Must First Be Sought.</p> <p>135. Same Subject—Compensation of Carrier—Services Rendered at Shipper's Request —Practice and Procedure —Remanding Case.</p> <p>135a. Jurisdiction of Federal Courts in Respect to Interstate Commerce Commission — Regulation of Carriers as to Cars — Where Redress Must First be Sought.</p> <p>136. Jurisdiction of Federal Courts in Respect to Interstate Commerce Commission—Shipper's Indebtedness for Demurrage — Refusal of Carriers to Receive Goods.</p> <p>137. Use of Process of Federal Circuit Court in Aid of Inquiries Before Interstate Commerce Commission—Testimony—Production of Books, etc.—Fine and Imprisonment — Contempt — Power of Commission.</p> <p>138. Judicial Functions of Non-judicial Bodies—Power to Compel Corporations to Produce Books, etc.—Notice—Courts—Due Process</p> |
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| <p>and Equal Protection—Contempt — Compensation to Witness.</p> <p>§ 139. Jurisdiction of Courts in Respect to Railroad Commissions—Generally.</p> <p>140. Same Subject.</p> <p>141. Same Subject.</p> <p>142. Jurisdiction of Courts—Railroad Commissioners—Public Service Commission—Certificate of Public Convenience and Necessity.</p> <p>143. Jurisdiction of Courts Over Rate Regulations—Generally.</p> <p>144. Same Subject.</p> <p>145. Legislative and Judicial Functions as to Rate Regulation—Distinctions.</p> <p>146. Equity Jurisdiction — Railroad, etc., Rates—Obligation of Contracts—Injunction—Discrimination.</p> <p>147. Extent of Judicial Interference as to Rate Regulations.</p> | <p>§ 148. Jurisdiction of Courts Before Rate Legislation Goes Into Effect.</p> <p>149. Jurisdiction of Courts in Respect to Railroad Commissions—Rates.</p> <p>150. Same Subject.</p> <p>151. Same Subject—Where Resort Must First Be Had.</p> <p>152. Same Subject — Appeal to State Supreme Court Before Suing in Federal Circuit Court.</p> <p>153. Jurisdiction of Courts in Respect to Railroad Commissions—Rates—When Constitutional Question Not Decided.</p> <p>154. Public Service Commission—Right to Appeal—Certiorari—Nature of Powers.</p> <p>155. Jurisdiction of Courts—Suit Against Railroad Commissioners — Whether Suit Against State.</p> |
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§ 123. Jurisdiction of Boards of Equalization—Conclusiveness of Decisions of—Review by Courts.

A State board of equalization is one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation. In regard to corporations of a certain class it is the duty of that board to make an original assessment upon them. Where no appeal is provided for from the decision of the board, such decision is conclusive, except as proceedings for relief may thereafter be taken in the courts. But the action of the board is reviewable in the Federal Courts at the instance of one claiming to be thereby deprived of his property without due process of law and denied the equal protection of the law; the provisions of the Fourteenth Amendment are not confined to the action of the State through its legislative, executive or judicial authority, but relate to all the instrumentalities through which the State acts. And action of

such a board which results in illegal discrimination is held not to be action forbidden by the State legislature and therefore beyond review of the Federal Courts under the Fourteenth Amendment.¹ Again, proceedings before a board of equalization are *quasi-judicial*, and if an order made by it is within its jurisdiction it is not void and cannot be resisted in an action at law; nor can overvaluation be made a ground of defense at law. The action of the tax officers being in the nature of a judgment must be yielded to until set aside. And this can only be done in a direct proceeding. So where the highest court of a State has decided that the board of equalization has acted according to the methods prescribed and authorized by the laws of the State, and that an order made by it is legal under the State Constitution and statutes, the decision constitutes an interpretation of the law of the State and is not open to dispute in the Federal Supreme Court.²

¹ *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 52 L. ed. 7, 28 Sup. Ct. 7, aff'g 114 Fed. 557, distinguishing on the last point, *Barney v. City of New York*, 193 N. Y. 430; see *Powers v. Detroit, Grand Haven & M. Ry. Co.*, 201 U. S. 543, 26 Sup. Ct. 556, 50 L. ed. 860, aff'g 138 Fed. 264; *Savannah, T. & I. of H. Ry. Co. v. Savannah*, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. 690.

As to equity jurisdiction and power of courts; injunction against collection of taxes; and railroad taxation, see *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663, cited as to remedy in *Norwood v. Baker*, 172 U. S. 269, 291, 300, 19 Sup. Ct. 187, 43 L. ed. 443; *Pittsburg, C., C. & St. Louis Ry. Co. v. Board of Public Works*, 172 U. S. 32, 37, 19 Sup. Ct. 90, 43 L. ed. 354; *Northern Pacific Rd. Co. v. Clark*, 153 U. S. 252, 272, 38 L. ed. 706, 14 Sup. Ct. 809; *Albuquerque Bank v. Perea*, 147 U. S. 87, 90, 37 L. ed. 91, 13 Sup. Ct. 600; *Milwaukee v. Koeffler*, 116 U. S. 219, 224, 29 L. ed. 612, 6 Sup. Ct. 372; *Thompson v. Allen County*, 115 U. S. 550, 557, 564, 29 L. ed. 472, 6 Sup. Ct. 140; *Virginia Coupon Cases*, 114 U. S. 270, 315 (there were eight of these cases, 114 U. S. at pp. 270, 307, 309, 311, 317, 323, 325, 338, 29 L. ed. 185, 199, 198, 200, 202, 205, 5 Sup. Ct. 903, 923, 924, 925, 928, 932, 962); *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516, 526, 29 L. ed. 517, 6 Sup. Ct. 475; *Snyder v. Marks*, 109 U. S. 189, 193, 3 Sup. Ct. 157, 27 L. ed. 901; *National Bank v. Kimball*, 103 U. S. 732, 733, 26 L. ed. 469; *Whitehead v. Farmers' Loan & Trust Co.*, 98 Fed. 12; *Linehan Ry. Transfer Co. v. Pendergrass*, 70 Fed. 2; *Chicago, Burlington & Quincy Rd. Co. v. Board of Comm'rs*, 67 Fed. 413; *Robinson v. City of Wilmington*, 65 Fed. 858.

² *Western Union Tel. Co. v. Missouri ex rel. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116.

§ 124. Jurisdiction of Courts—Certiorari to Review Assessment—Special Franchise Tax—Requirements as to Return by Tax Commissioners.

It is held in a late case in New York that on certiorari to review the assessment of a special franchise tax, the tax commissioners should be required to specify in their return the records and papers upon which the determination was made, the evidence presented before the board in open session, and to state the separate valuations placed upon real property in the street and upon the use of the street, if separate valuations were made, together with the material facts which enter into their determination. Although the board of tax commissioners in making such assessment may obtain information apart from the record and may have its own experts make an examination of facts bearing upon the value of the franchise, it should not be required to make a return of specific information acquired apart from the open session or through agents and experts. On certiorari under the tax law the court has power to take further evidence, or direct such evidence to be taken before a referee, and hence there is not the same necessity for a full and complete return that exists in the case of the ordinary writ.³

§ 125. Board of Harbor Commissioners—Jurisdiction of Courts.

Under a California decision the courts will refuse to interfere with the discretion of harbor commissioners, vested in them under the political code of that State in the matter of regulating the position of vessels, even if such discretion is erroneously exercised and may operate as a hardship on individuals, provided, however, there is an honest exercise of judgment; and if a fraudulent exercise of discretion is claimed in changing the wharf of a vessel the court will not interfere unless the fraud is clearly established; the proof must be of something greater than suspicion alone.⁴

³ *People ex rel. New York, Ontario & Western Ry. Co. v. Tax Commissioners*, 132 App. Div. 604.

⁴ *Union Transportation Co. v. Bassett*, 118 Cal. 604, 50 Pac. 754, rev'g in Banc, 46 Pac. 907.

§ 126. Resolution of City Council and Direction to City Solicitor to Enforce Same Against Street Railway—Obligation of Contract—Jurisdiction of Federal Circuit Court—Injunction.

A resolution of a municipal council directing a street railway company to remove and replace tracks and wires, and, in case of failure to comply, instructing the city solicitor to take such action as he deems advisable to enforce the resolution, amounts only to direction to bring a suit; and, even if contract rights should be violated if the resolution were enforced, the resolution does not of itself amount to an ordinance or law impairing the obligation of contracts, and the Federal Circuit Court has no jurisdiction of a suit to enjoin its enforcement. Mr. Justice Holmes said: "We are of opinion that this is not a law impairing the rights alleged by the appellee, and, therefore, that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the city solicitor to take action to enforce the city's position. The only action to be expected from the city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the company to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right." ⁵

⁵ *Des Moines, City of, v. Des Moines City Ry. Co.*, 214 U. S. 179, 53 L. ed. 968, 29 Sup. Ct. 553. This was a bill brought in the Circuit Court by an Iowa corporation against a city in Iowa. The ground of jurisdiction was that a resolution of the city council impaired the obligation of contract and also if carried out would take the property of the corporation without due process of law contrary to the Fourteenth Amendment. The Circuit Court granted an injunction against the enforcement of the resolution, and the defendant appealed to the Federal Supreme Court. The plaintiff, the appellee,

§ 127. Condemnation Proceedings — Commissioners — State Crossing Board—Jurisdiction of Courts—Waiver.

The United States cannot interfere with the exercise by the State of her right of eminent domain in taking for public use land, within her limits, which is private property. But when the inquiry whether the conditions prescribed by her statutes for its exercise have been observed takes the form of a judicial proceeding between the owner of lands and a corporation seeking to condemn and appropriate them, the controversy is subject to the ordinary incidents of a civil suit, and its determination does not derogate from the sovereignty of the State. So a controversy of this kind in a State, when carried, under a law thereof, from the commissioners of appraisal to the State Court, taking there the form of a suit at law, may, if it is between citizens of different States, be removed to a Federal Court.⁶ In condemnation proceedings to acquire an existing system of water supply in a city, which system is the property of private individuals operated under a contract with the city the assessment of damages may be made by commissioners where the statutes so provide, and there is no denial of due process of law in making their findings final as to the facts, leaving open to the courts the inquiry whether there was any erroneous basis adopted by the commissioners in their appraisal, or other errors in their proceedings, and this applies where there is nothing in the statute under which a water supply company was organized, nor in any contract with the town in question for a water supply, nor in the annexation to a municipality which gave to such company rights exclusive beyond such legislative action.⁷ Under a Michigan decision the State crossing board is given the requisite jurisdiction as to

set up, under a certain ordinance, a right unlimited as to time to construct, maintain and operate an electric street railway in and over the streets, alleys and bridges of Des Moines.

⁶ *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206. See as to last point *Madisonville Traction Co. v. Saint Bernard Min. Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 262.

⁷ *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1154, 17 Sup. Ct. 677.

making orders in condemnation proceedings to condemn land for terminal branches of a railroad at the time of its being organized, where a map of the road was then filed including the terminal branches, and the certified approval of the board of directors was given thereto.⁸ An objection, taken by a property owner in a condemnation proceeding for a part of his property, that, under the statute, his entire property must be condemned, is waived and cannot be maintained on appeal, if he accepts the award made by the commissioners in the condemnation proceeding and paid in by the condemnors for the parcel actually condemned. After an award has been made and accepted the proceeding is *functus officio*.⁹

§ 128. Jurisdiction of Courts—Insurance—State Auditor—Superintendent of Insurance.

Where trust funds for the benefit of policy holders are in the possession of the State auditor, through securities, which have been deposited with the insurance commissioner by an insurance company as required by law, being illegally surrendered and transferred, the court will take jurisdiction of such auditor as to the control and disposition of said trust fund.¹⁰ A superintendent of insurance, who is without authority to revoke a license to do business in the State of an insurance company organized in another State, may be enjoined from so revoking by the Federal Court.¹¹

§ 129. Jurisdiction of Officers of Land Department—Control and Supervision of by Courts—Mandamus—Injunction.

Congress has constituted the Land Department, under the

⁸ *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.*, 72 Mich. 206, 40 N. W. 436.

⁹ *Winslow v. Baltimore & Ohio Rd. Co.*, 208 U. S. 59, 52 L. ed. 388, 28 Sup. Ct. 190, *aff'g* 28 App. D. C. 126.

¹⁰ *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245, 69 N. W. 916.

When state auditor cannot be compelled by the Federal Court to issue to a foreign insurance company a certificate authorizing it to do business in the State, see *Manchester Fire Ins. Co. v. Herriott* (U. S. C. C.), 91 Fed. 711.

¹¹ *Metropolitan Life Ins. Co. v. McNall* (U. S. C. C.), 81 Fed. 888, 26 Ins. L. J. 641, 14 Nat. Corp. Rep. 675.

supervision and control of the Secretary of the Interior, a special tribunal with judicial functions to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. The Secretary having jurisdiction to decide at all, has necessarily jurisdiction to decide as he thinks the law is, and it is his duty so to do, and the courts have no jurisdiction under those circumstances to review his determination by mandamus or injunction; neither of these writs will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. The courts have no general supervisory power over these officers by which they can control their decisions upon questions within their jurisdiction.¹² So where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power, and will occasionally exercise the right of so doing.¹³ The rule is that in the administration of the public lands of the United States the decisions of the Land Department upon questions of fact are conclusive and only questions of law are

¹² *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. 698. See also *Love v. Flahive*, 205 U. S. 195, 51 L. ed. 768, 27 Sup. Ct. 488, aff'g 83 Pac. 882; *Estes v. Timmons*, 199 U. S. 391, 50 L. ed. 241, 26 Sup. Ct. 85; *McMichael v. Murphy*, 197 U. S. 304, 25 Sup. Ct. 460, 49 L. ed. 766; *Small v. Rakestraw*, 196 U. S. 403, 25 Sup. Ct. 285; 49 L. ed. 527; *Gertgens v. O'Connor*, 191 U. S. 237, 24 Sup. Ct. 94; 48 L. ed. 163; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. 692; *Potter v. Hall*, 189 U. S. 292, 23 Sup. Ct. 545, 47 L. ed. 417; *De Cambra v. Rogers*, 189 U. S. 119, 23 Sup. Ct. 519, 47 L. ed. 734; *New Orleans v. Paine*, 147 U. S. 261, 37 L. ed. 162, 13 Sup. Ct. 303 (cited in *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 594, 42 L. ed. 591, 18 Sup. Ct. 208; *Astiasarin v. Santa Rita Min. Co.*, 148 U. S. 80, 83, 27 L. ed. 376, 13 Sup. Ct. 457).

¹³ *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 559, 48 L. ed. 894, citing (at p. 109) *Riverside Oil Co. v. Hitchcock*, cited in last preceding note. See *Whitcomb v. White*, 214 U. S. 15, 53 L. ed. 889; 29 Sup. Ct. 599, aff'g 13 Idaho, 490; *Enterprise Sav. Assoc. v. Zumstein* (U. S. C. C. A.), 67 Fed. 1000, aff'g 64 Fed. 837, as to same principle.

reviewable in the courts. In the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision and direction of the Secretary of the Interior.¹⁴ But it is held that judicial power is not unconstitutionally conferred on a State board of land com-

¹⁴ *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 15 Sup. Ct. 779, 39 L. ed. 931, citing *Barden v. Northern Pacific Rd.*, 154 U. S. 288, 327, 38 L. ed. 992, 14 Sup. Ct. 1030; *United States v. California & Oregon Land Co.*, 143 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. 458; *Knight v. United States Land Assoc.*, 142 U. S. 161, 177, 12 Sup. Ct. 258, 35 L. ed. 974; *Cragin v. Powell*, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. 203; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. ed. 1039; *Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. 249; *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. ed. 110; *Rector v. Gibbon*, 111 U. S. 276, 28 L. ed. 427, 4 Sup. Ct. 605; *Baldwin v. Stark*, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. 473; *Missionary Society v. Dallas*, 107 U. S. 336, 2 Sup. Ct. 672, 27 L. ed. 545; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. ed. 226; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *Quimby v. Conlan*, 104 U. S. 420, 26 L. ed. 800; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929; *Marques v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848; *Shepley v. Cowan*, 91 U. S. 330, 23 L. ed. 424; *Warren v. Van Brunt*, 19 Wall. (86 U. S.) 646, 22 L. ed. 219; *Lamb v. Davenport*, 18 Wall. (85 U. S.) 307, 314, 21 L. ed. 759; *Johnson v. Towaley*, 13 Wall. (80 U. S.) 72, 20 L. ed. 485. The principal case is cited in *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 309, 47 L. ed. 1064, 23 Sup. Ct. 692 (to the point of jurisdiction of the Land Department unless taken away by some affirmative provision of law. The case also decides that the court will not determine title while the questions are still before the Land Department and there undecided. See also to this last point *Kirwan v. Murphy*, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. 599) *Johanson v. Washington*, 190 U. S. 179, 185 (to the point that the general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and that unless Congress selects some other officer to act in respect to such matters it will be assumed that he is the officer to represent the Government); *United States v. Beebe*, 117 Fed. 670, 679; *Northern Pacific Rd. Co. v. McCormick*, 94 Fed. 932, 941; *Diller v. Hawley*, 81 Fed. 651, 657; *Johnston v. Morris*, 72 Fed. 890, 897; *American Bell Telephone Co. v. United States*, 68 Fed. 542, 569.

Jurisdiction in its common law and technical meaning is declared not to be a term applicable to the Commissioner of the Land Office to issue grants or patents to land. The case, however, holds that the authority of the Commissioner of Patents to grant a patent is not of the nature of jurisdiction in the common-law acceptance. *Wilder v. McCormick*, 2 Blatch. (U. S. C. C.) 31, 34 Fed. Cas., No. 1760, p. 1221.

missioners.¹⁵ Still the decisions of State land officers are also decided not to be conclusive, but may be inquired into and declared void by the courts.¹⁶

§ 130. Same Subject—Railroads—Right of Way.

A decision of the Secretary of the Interior in the exercise of the powers conferred upon him by the act of 1875¹⁷ that a designated railroad company is entitled to a right of way over public land, cannot be revoked by his successor in office, and whether a railroad company, applying for such a grant, is a company which the statute authorizes to receive a grant of a right of way is a *quasi*-judicial question, which, when once determined by the Secretary, is finally determined so far as the executive is concerned.¹⁸ It is further decided that it is not within the province of the courts to interfere with the administration of the Land Department, and until the land is patented inquiry as to equitable rights comes within the cognizance of the Department and the courts will not anticipate its action.¹⁹

¹⁵ *American Sulphur & Mining Co. v. Brennan*, 20 Colo. App. 439, 79 Pac. 750.

When jurisdiction and control of land may be delegated to county through board of supervisors under general supervision of land commissioners, see *Jefferson Davis County v. James-Sumrall Lumber Co.* (Miss., 1909), 49 So. 611.

¹⁶ *Minnesota v. Bachelder*, 1 Wall. (68 U. S.) 109, 17 L. ed. 551.

¹⁷ Act of March 3, 1875, chap. 152, 18 Stat. 482.

¹⁸ *Noble v. Union River Logging Rd. Co.*, 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. 271. See *Curtner v. United States*, 149 U. S. 662, 676, 13 Sup. Ct. 985, 1041, 37 L. ed. 890.

¹⁹ *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. 568. See further as to jurisdiction of courts in such matters the following cases: *Humbird v. Avery*, 195 U. S. 480, 49 L. ed. 286, 25 Sup. Ct. 123 (Northern Pacific Railroad grant); *Clark v. Herington*, 186 U. S. 206, 22 Sup. Ct. 872, 46 L. ed. 1128 (Union Pacific Railroad grants); *Hawley v. Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. 986; *Brown v. Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. 485; *Parsons v. Venzke*, 164 U. S. 89, 17 Sup. Ct. 27, 41 L. ed. 360; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. 217; *United States v. Missouri, Kansas & Texas Ry. Co.*, 141 U. S. 358, 12 Sup. Ct. 13, 35 L. ed. 766 (railroad and telegraph grant); *Sanford v. Sanford*, 139 U. S. 642, 35 L. ed. 290, 11 Sup. Ct. 266; *United States v. Marshall Silver Min. Co.*, 129 U. S. 579, 32 L. ed. 734, 9 Sup. Ct. 343; *Craig v. Leitensdorfer*, 123 U. S. 189, 8 Sup. Ct. 85, 31 L. ed. 114; *Litchfield v. Register & Receiver*,

§ 131. Jurisdiction of Courts in Respect to Interstate Commerce Commission—Generally.

In a proceeding in the Circuit Court²⁰ under the Interstate Commerce Law to enforce an order made by the commission, the court has no general power to adjust differences between the litigants, or to correct abuses in the conduct by a railroad company of its business; and, unless a valid order has been made by the commission and violated by the company no relief can be granted to the petitioners.²¹ In a suit by the Interstate Commerce Commission to enforce an order made by it, the court is not confined in passing on the validity of the order to the reasons stated by the commission.²² In determining whether an order of the Interstate Commerce Commission shall be suspended or set aside, power to make, and not the wisdom of, the order is the test, and the Federal Supreme Court must consider all relevant questions of constitutional power or right, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to be made, and also whether even if in form it is within such delegated authority it is not so in substance because so arbitrary and unreasonable as to render it invalid. If an order of the Interstate Commerce Commission is sus-

¹⁹ Wall. (76 U. S.) 575, 19 L. ed. 681; *Secretary v. McGarrahan*, 9 Wall. (76 U. S.) 298, 19 L. ed. 579; *Gaines v. Thompson*, 7 Wall. (74 U. S.) 347, 19 L. ed. 62; *Lindsey v. Hawes*, 2 Black (67 U. S.), 554, 17 L. ed. 265; *Lytle v. Kansas*, 22 How. (63 U. S.) 193, 16 L. ed. 306; *Irvine v. Marshall*, 20 How. (61 U. S.) 558, 15 L. ed. 994; *Garland v. Wynn*, 20 How. (61 U. S.) 6, 15 L. ed. 801.

When jurisdiction of Land Department ceases, see *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167, cited in *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. ed. 591; *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 302, 10 Sup. Ct. 765, 34 L. ed. 155; *United States v. American Bell Telephone Co.*, 128 U. S. 315, 363, 32 L. ed. 450, 9 Sup. Ct. 90; *Mullan v. United States*, 118 U. S. 271, 279, 6 Sup. Ct. 1041, 30 L. ed. 170; *Bicknell v. Comstock*, 113 U. S. 149, 151, 5 Sup. Ct. 399, 28 L. ed. 962; *City of New Orleans v. Paine*, 51 Fed. 838.

²⁰ Under § 16 of Interstate Commerce Law.

²¹ *Syllabus in Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co.* (U. S. C.C.), 83 Fed. 249.

²² *Southern Pacific Co. v. Interstate Commerce Commission*, 200 U. S. 336, 26 Sup. Ct. 330, 50 L. ed. 585.

tained by the court below in part and only the commission appeals, the conclusions of the court below as to those portions of the order sustained are not open to inquiry in the Federal Supreme Court; and in determining whether the action of the court below was or was not correct said Supreme Court does so irrespective of the reasoning by which such action was induced.²³ The findings of the Interstate Commerce Commission are made by the law *prima facie* true, and the Federal Supreme Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.²⁴

§ 132. Jurisdiction of Federal Courts in Respect to Interstate Commerce Commission—Rates.

The Federal Circuit Court has jurisdiction to review the findings of the Interstate Commerce Commission as to rates, affecting interstate commerce, long and short hauls, and undue and unreasonable preferences; or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, giving effect to the findings as *prima facie* evidence of the matters stated therein.²⁵ So power to determine and prescribe what are just and reasonable maximum rates to be charged in interstate commerce is, in a limited way, conferred upon the Interstate Commerce Commission by existing statute law; but as the commission acts only as a legislative or administrative board, and not judicially, its determination or action does not, and cannot, preclude judicial inquiry into the justness and reasonableness of the rates, within the meaning of the

²³ *Interstate Commerce Commission v. Illinois Central Rd. Co.*, 215 U. S. 452, 54 L. ed. —, 30 Sup. Ct. —, cited in *Baltimore & Ohio Rd. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. —, 54 L. ed. —, to the point that under the court review provisions of § 15 of the act to regulate commerce as amended in 1906, the courts are limited to the question of power of the commission to make the order and cannot consider the wisdom or expediency of the order itself.

²⁴ *Illinois Central Rd. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. ed. 128.

²⁵ *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. 45.

constitutional guaranty, for that is a judicial question. The Federal Circuit Court may, therefore, inquire whether rates fixed by the Interstate Commerce Commission are just and reasonable within the meaning of the constitutional guaranty, and whether they are unjustly discriminatory, or unduly preferential, within the meaning of the statute. The statute under which the Interstate Commerce Commission derives its power to prescribe rates at all also unequivocally recognizes, and, if there be need therefor, it plainly declares, that the Federal Circuit Courts, sitting in equity, are vested with jurisdiction to entertain, hear, and determine suits to compel obedience to orders of the commission prescribing rates, and also suits to annul or enjoin the enforcement of such orders. It is not conceived that the scope of the inquiry which the court is authorized to make, or the effect to be given to the commission's finding or determination upon which its order is based, is intended to be in anywise different when the suit is one to annul or enjoin the enforcement of the order than when it is one to enforce obedience thereto. It is not intended that the hearing in such a suit, whether it be of the one kind or the other, shall be confined to an ascertainment of what was determined by the commission and to a consideration of the sufficiency of the facts as determined by it to sustain the order; but on the contrary, the hearing may be *de novo*, and may include the taking and consideration of evidence other than that before the commission. Again, evidence submitted by railway companies in such case may be considered which was not before the commission. The court should, however, start with the presumption that the order of the commission is valid, and was made after a careful consideration and correct determination of every question of fact underlying it. The burden of showing that the facts are such as to render the order invalid rests upon the carrier assailing it, and unless the case made on behalf of the carrier is a clear one the order ought to be upheld.²⁵ Again,

²⁵ *Missouri, Kansas & Texas Ry. Co. v. Interstate Commerce Commission* (U. S. C. C.), 164 Fed. 645, 650. A suit in equity against the Interstate Commerce Commission by certain railway companies and the receivers of

it is decided, however, that under the Interstate Commerce Act²⁷ the Interstate Commerce Commission has original and exclusive jurisdiction to determine the question of the reasonableness of an established rate for the interstate transportation of freight, and when a schedule of rates has been duly filed and has gone into effect the rates thereby prescribed are the only lawful rates until changed by the commission, and a court has no power to enjoin their enforcement.²⁸ It is declared in a

other railway companies to annul and enjoin the enforcement of an order of the commission requiring such companies to desist from exacting certain terminal charges as to shipments originating outside the State, and prescribing a maximum charge per car for such terminal service, and also requiring the railway companies to desist from exacting existing through rates for transportation of cattle in car loads from and to outside points and for prescribing for such through service maximum rates to be charged. The court also says, as to express declaration of the statute stated in the text, that: "This is shown (a) by the provision in Section 15 [Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. Stat. 1901, p. 3165), as amended by act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. Stat. Supp. 1907 p. 900)], that 'all orders of the commission, except orders for the payment of money, shall take effect * * * and shall continue in force * * * not exceeding two years, * * * unless the same shall be * * * suspended or set aside by a court of competent jurisdiction;' (b) by the provision in Section 16 that when any carrier fails or neglects to obey 'any order of the commission, other than for the payment of money,' while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court for an enforcement of such order, and 'the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition;' (c) by the further provision in § 16 that 'the venue of suits brought in any of the Circuit Courts of the United States against the commission to enjoin, set aside, annul or suspend any order or requirement of the commission shall be in' designated districts, 'and jurisdiction to hear and determine such suits is hereby vested in such courts;' and (d) by the still further provision in § 16 that the provisions of the expedition act [act, Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. Stat. Supp. 1907, p. 951)] 'are hereby made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the commission.'"

²⁷ Act of Feb. 4, 1887, chap. 104, 24 Stat. 379, U. S. Comp. Stat. 1901, p. 3154, as amended, including the amendatory act of June 29, 1906, chap. 3591, 34 Stat. 584, U. S. Comp. Stat. Supp. 1907, p. 892.

²⁸ Syllabus in *Great Northern Railway Co. v. Kalispell Lumber Co.*, 165 Fed. 25.

comparatively recent case that the statute gives *prima facie* effect to the findings of the commission, and when those findings are concurred in by the Federal Circuit Court, they should not be interfered with, unless the record establishes that clear and unmistakable error has been committed.²⁹

§ 133. Same Subject.

The reasonableness of a rate is a question of fact, and while the conclusions of the Interstate Commerce Commission are subject to review, if that body excludes facts and circumstances that ought to have been considered they will not after having been affirmed by the Circuit Court and Circuit Court of Appeals, be reversed because the commission did not adopt the presumptions of mixed law and fact put forward as elements for determining the reasonableness of a rate; and where the inquiry before the commission is essentially one of fact, the existence of competition cannot in the Federal Supreme Court be made an inference of law dominating against the actual findings of the commission and their affirmance by the Circuit Court.³⁰ The Interstate Commerce Act was intended to afford an effective and comprehensive means of redressing wrongs resulting from unjust discriminations and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates; and consistently with the provisions of that law, a shipper cannot maintain an action at common law in a State Court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those duly fixed by the carrier according to the act and had not been found to be unreasonable by the Interstate Commerce Commission. And where defendant in the State Court contends that, consistently with the Interstate Commerce Act, the State Court has no power to grant the relief, and such contention is essentially involved and expressly, and in order

²⁹ *Cincinnati, Hamilton & Dayton Ry. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 154, 51 L. ed. 995, 27 Sup. Ct. 648, per Mr. Justice White, case affirms 146 Fed. 559.

³⁰ *Illinois Central Rd. Co. v. Interstate Commerce Commission*, 206 U. S. 41, 27 Sup. Ct. 700, 51 L. ed. 128.

to support the judgment, necessarily, decided adversely to the defendant, a Federal question exists and the Federal Supreme Court can review the judgment on a writ of error.³¹

§ 134. Same Subject—Injunction—Where Redress Must First Be Sought.

A Federal Court of the district of which the complainants are inhabitants has jurisdiction of a suit to enjoin several railroad companies, who are members of an association, from putting into effect an alleged unlawful rate on all food commodities shipped in interstate commerce within the territory in which such district is situated, although none of the defendants are citizens of the State, where they operate roads in the State and district and are found and served therein.³² It was subsequently held, however, that a Federal Court of Equity might enjoin the putting into effect an arbitrary and unreasonable and unjust interstate freight rate which a combination had adopted until the Interstate Commerce Commission should pass upon such rate in order thereby to prevent resulting irreparable injury.³³ It is held, however, that a shipper seeking reparation predicated upon the unreasonableness of an established rate under the act to regulate commerce must primarily seek redress through the Interstate Commerce Commission, as that body has plenary power to determine in the first instance what rates are legal or illegal, reasonable or excessive for the transportation of interstate commerce; and in maintaining action it must be alleged that resort has been had to that commission and the rate charged and paid declared excessive and unreasonable.³⁴

³¹ *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 523, 27 Sup. Ct. 350.

³² Syllabus in *Macon Grocery Co. v. Atlantic Coast Line Rd. Co.* (U. S. C. C.), 163 Fed. 736. Bill for injunction was retained until application to and determination by the Interstate Commerce Commission.

³³ *Macon Grocery Co. v. Atlantic Coast Line Rd. Co.* (U. S. C. C.), 163 Fed. 738. Compare *Chicago, Burlington & Quincy Rd. Co. v. Winnett* (U. S. C. C. A.), 162 Fed. 242.

³⁴ *Meeker v. Lehigh Valley Rd. Co.* (U. S. C. C.), 162 Fed. 354, citing *Texas*

§ 135. Same Subject—Compensation of Carrier—Services rendered at Shipper's Request—Practice and Procedure—Demanding Case.

A carrier which is at service and expense in stopping goods in transit for inspection and reloading for the benefit of the shipper is entitled to compensation in addition to the actual expense incurred. But where the Interstate Commerce Commission has held, and its order has been affirmed by the Federal Circuit Court and Circuit Court of Appeals, that a carrier cannot charge for a service rendered at the request and for the benefit of the shipper any amount in excess of the actual expense incurred, and fixed a rate less than the Federal Supreme Court considers reasonable, said court cannot, where the testimony has not been preserved in the record, fix a fair and reasonable charge, but will reverse the judgments of both courts and remand the case to the former court with instructions to send the matter back to the commission for further investigation and report.³⁵

§ 135a. Jurisdiction of Federal Courts in Respect to Interstate Commerce Commission—Regulation of Carriers as to Rates—Where Redress Must First be Sought.

Regulations which are primarily within the competency of the Interstate Commerce Commission are not subject to judicial supervision or enforcement until that body has been properly afforded an opportunity to exert its administrative functions. So the distribution to shippers of coal cars including those owned by the shippers and those used by the carrier for its own fuel is a matter involving preference and discrimination and within the competency of the Interstate Commerce Commission, and the courts cannot interfere with regulations regarding such distribution until after action thereon by the commission. And even if not assigned as error, the United

Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 439-441, 448, 27 Sup. Ct. 350, 355, 51 L. ed. 553.
Southern Ry. Co. v. St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. ed. 414, 29 Sup. Ct. 678, rev'g 153 Fed. 728.

States Supreme Court will consider the jurisdictional question of whether there is power in the court, in view of the act to regulate commerce, to grant relief prayed for in regard to matters within the competency of said commission.³⁶

§ 136. Jurisdiction of Federal Courts in Respect to Interstate Commerce Commission—Shipper's Indebtedness for Demurrage—Refusal of Carrier to Receive Goods.

It is held in a recent case that the United States Circuit Court has jurisdiction to determine in the first instance the indebtedness of a shipper to a railroad company for demurrage, under the rules adopted by the company and filed with the Interstate Commerce Commission, where it depends upon the construction and not upon the reasonableness or unreasonableness of such rules although the latter question is one primarily for the commission.³⁷ Where an interstate carrier refuses to receive and forward goods tendered for shipment and the goods consist of a class for which a classification and rate had been generally made, and there is no complaint that the rates are unreasonable, or that the shipper was subjected to any undue disadvantage in competition with other shippers of his class or that the place from which the goods were to be shipped is discriminated against, a suit based on such refusal to carry is one under the common law, is *in personam*, and is not dependent upon the Interstate Commerce Act, or limited to proceedings before the Interstate Commerce Commission, but the State Courts where tender of the shipment was made or the Federal Courts on removal have jurisdiction, without regard to the fact that the refusal was based upon a statute of another State to which they were consigned making it unlawful for carriers to bring into certain countries, etc., in such State goods of the class tendered for shipment, as such statute was a police regulation and would be void as a regulation of interstate commerce.³⁸

³⁶ *Baltimore & Ohio Rd. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. ed. —, 30 Sup. Ct. —. See § 106a, herein.

³⁷ Syllabus in *Hite v. Central Ry. Co. of N. J.* (U. S. C. C. A.), 171 Fed. 370.

³⁸ *Louisville & Nashville R. Co. v. F. W. Cook Brewing Co.* (U. S. C. C. A.), 172 Fed. 117.

§ 137. Use of Process of Federal Circuit Court in Aid of Inquiries Before Interstate Commerce Commission—Testimony—Production of Books, etc.—Fine and Imprisonment—Contempt—Power of Commission.

The twelfth section of the Interstate Commerce Act authorizing the Federal Circuit Courts to use their process in aid of inquiries before the commission established by that act, is not in conflict with the Constitution of the United States as imposing on judicial tribunals duties not judicial in their nature: and a petition filed under that section in the Circuit Court against a witness, duly summoned to testify before the commission, to compel him to testify or produce books, documents and papers relating to the matter under investigation before that body, makes a case of controversy to which the judicial power of the United States extends. The power conferred upon the commission to require the attendance and testimony of witnesses and the production of books, papers and documents relating to the matter under investigation by it imposes upon anyone summoned by that body to appear and testify, or to produce books, etc., the duty so to do, if the testimony or evidence sought relate to the matter under investigation, provided such matter is one which the commission is legally entitled to investigate, and the witness is not excused by law or on some personal ground from doing what the commission so requires him to do. But the authority to destroy or impair fundamental guarantees of personal rights which are recognized by the Constitution as inhering in the freedom of the citizen, is not embodied in the power given to Congress to regulate interstate commerce. And a defendant in a proceeding of such a character before the Circuit Court may contend that he was protected by the Constitution from answering the questions propounded to him and that he was not bound to produce the books, etc., ordered to be produced, and that neither the questions nor the books, etc., related to the particular matter under investigation, nor to any matter which the commission was entitled under the constitution or laws to investigate, and the court upon determining this issue in favor of the defendant could dismiss the petition

upon its merits. The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system or government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution³⁹ of the exercise by either house of Congress of the right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. Such a proceeding under the twelfth section of the Interstate Commerce Act is not merely ancillary and advisory, nor is its object merely to obtain an opinion of the Circuit Court that would be without operation upon the rights of the parties. Any judgment rendered will be a final and indisputable basis of action as between the commission and the defendant and furnish a precedent for similar cases. The judgment is none the less one of a judicial tribunal dealing with questions judicial in their nature and presented in the customary forms of judicial proceedings, because the effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution. The issue in such a case is not one for the determination of a jury, nor can any question of contempt arise until the issue of law in the Circuit Court is determined adversely to the defendant, and he refuses to obey, not the order of the

³⁹ Which are considered in *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. ed. 377, and in *Anderson v. Dunn*, 6 Wheat. (19 U. S.) 204, 5 L. ed. 242.

commission, but the final order of the court. In matters of contempt a jury is not required by due process of law.⁴⁰

* *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047, dissenting opinion in 155 U. S. 3, 39 L. ed. 49, 15 Sup. Ct. 19. [Case of appeal bringing up for review a judgment dismissing a petition filed in the Federal Circuit Court by the Interstate Commerce Commission under the act of Congress to "regulate commerce" approved Feb. 4, 1887, and amended by acts of March 2, 1889, and Feb. 10, 1891, 24 Stat. 379, chap. 104; 25 Stat. 855, chap. 382; 26 Stat. 743, chap. 128; 1 Supp. Rev. Stat. 529, 684, 891. (See as to act of 1903, 194 U. S. 25, cited below in this note.) The petition was based on the twelfth section of the act authorizing the commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers. The Circuit Court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, the proceeding was not a case to which the judicial power of the United States extended. *Interstate Commerce Commission, In re*, 53 Fed. 476, 480], distinguishing (on the fourth point) *Sanborn, In re*, 148 U. S. 222, 37 L. ed. 429, 13 Sup. Ct. 577; *Gordon v. United States*, 117 U. S. 697, 29 L. ed. 921; *Barrow v. Hill (Todd's Case)*, 13 How. (54 U. S.) 52, 14 L. ed. 47; *United States v. Ferreira*, 13 How. (54 U. S.) 40, 14 L. ed. 42; *Hayburn's Case*, 2 Dall. (2 U. S.) 409, 1 L. ed. 436. Principal case is cited in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 418 (to the point that "it was intimated that there was a limit" to the power of Congress to legislate upon the subject-matter of the questions put to the witnesses; but the question was passed by); cited and quoted *Id.*, 427 (in dissenting opinion, as to authority of Interstate Commerce Commission to conduct an investigation upon its own motion); cited in *Alexander v. United States*, 201 U. S. 117, 121, 50 L. ed. 686, 26 Sup. Ct. 356 (as to contention that to justify appeal the order of the Circuit Court constitutes practically an independent proceeding and amounting to final judgments); cited and quoted from in *Hale v. Henkel*, 201 U. S. 43, 72, 26 Sup. Ct. 370, 50 L. ed. 652 (as sustaining the constitutionality of the Interstate Commerce Act so far as it authorized the Circuit Courts to use their processes in aid of inquiries before the commission); *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 42, 48 L. ed. 860, 24 Sup. Ct. 603 (to point that commission has no power to fix rates). *Id.*, 38 (to point that before passage of act of 1903, a petition filed under § 12 of the prior act, made a case of controversy to which the judicial power of the United States extended; also as to proceeding not being merely advisory to commission, and judgment being final and indisputable basis of action as between commission and defendant, and as furnishing a precedent in similar cases; and while the object is obtaining testimony, important questions may be involved touching power of commission; also adding that intent of Congress rendered it imperative that such cases should be promptly determined in a court of last resort. This case holds that under the proviso in § 3 of the act of Feb. 19, 1903, a direct appeal may be taken to the Federal Supreme Court

§ 138. Judicial Functions of Nonjudicial Bodies—Power to Compel Corporations to Produce Books, etc.—Notice—Courts—Due Process and Equal Protection—Contempt—Compensation to Witness.

In connection with the point first stated under the last

from a judgment of the Circuit Court in a proceeding brought by the Interstate Commerce Commission, under the direction of the attorney general, to obtain orders requiring the testimony of witnesses and the production of books and documents); cited in *Northern Securities Co. v. United States*, 193 U. S. 197, 353, 48 L. ed. 679, 24 Sup. Ct. 436 (to point that railroad companies are instruments of commerce and as operating public highways are subject to governmental control and regulation); *Atlantic & Pacific Teleg. Co. v. Philadelphia*, 190 U. S. 160, 162, 47 L. ed. 995, 23 Sup. Ct. 671 (to point of exclusive power of Congress to regulate interstate commerce); *District of Columbia v. Eslin*, 183 U. S. 62, 66, 22 Sup. Ct. 17, 46 L. ed. 85 (as to extent of exercise of judicial power by Supreme Court in matter of jurisdiction of Court of Claims; a final judgment and appeal, dismissed for want of jurisdiction); *Downes v. Bidwell*, 182 U. S. 244, 289, 45 L. ed. 1088, 21 Sup. Ct. 770 (to point that wherever a power is given by Congress and a limitation is imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits); *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 457, 44 L. ed. 276, 20 Sup. Ct. 168 (to point that Court of Claims function is ancillary and advisory, and findings or conclusions not enforceable by any process of execution issuing from the court, nor is it by statute the final and indisputable basis of action); cited and quoted from in *United States v. Duell*, 172 U. S. 576, 588, 19 Sup. Ct. 286, 43 L. ed. 559 (and upon point of finality of judgment and being none the less one because effect may be to aid an administrative or executive body in performance of duties legally imposed by Congress under the Constitution; a case as to judicial function of Commissioner of Patents); cited in *United States v. Joint Traffic Assoc.*, 171 U. S. 505, 571, 43 L. ed. 259, 19 Sup. Ct. 25 (to point that power to regulate commerce has no limitations other than prescribed by the Constitution and such power does not carry right to destroy or impair limitations and guarantees in Constitution and its amendments; constitutional right of citizen to make contracts, and power of Congress to prohibit contracts of nature involved in this case); cited and quoted from in *Debs, In re*, 158 U. S. 564, 597, 15 Sup. Ct. 900, 39 L. ed. 1092 (as to contempt not being a question triable of right by a jury); cited in *Fulgham v. Midland Valley R. Co.*, 167 Fed. 660, 662, (as to exclusive power of Congress to regulate commerce; a case of action for injury to employé and scope of Railroad Employers' Liability Act of Congress); *O'Shea, In re*, 166 Fed. 180, 182 (to point that argument not sound, that witness obligated to answer, in a special examination, questions as to merits of pension claims even though tending to incriminate); *Interstate Commerce Commission v. Harri-man*, 157 Fed. 436; *Riggsbee, In re*, 151 Fed. 701, 703 (to point that party is not entitled to jury trial); *Western New York & Pennsylvania Rd. Co. v.*

preceding section it is held by the Federal Supreme Court in a comparatively recent case that nothing in the Federal Constitution prohibits a State from conferring judicial functions on nonjudicial bodies. The case was one of notice to a corporation, given pursuant to a statute, to produce certain described books and papers before the grand jury. The notice was required to be issued from the court or tribunal before whom the papers were required to be produced, and for neglect or refusal without reasonable cause to comply the corporation could be fined. *United States v. American Refining Co.*, 137 Fed. 343, 349 (to point that Interstate Commerce Commission though clothed with quasi-judicial functions, is an administrative body in contradistinction to a judicial tribunal); *Interstate Commerce Commission v. Philadelphia & R. Ry. Co.*, 123 Fed. 969, 970 (to point that upon application for an order by Interstate Commerce Commission requiring witnesses to appear before it, etc., the Circuit Court does not sit as an appellate tribunal, but should decide all questions raised as to relevancy of such testimony if such questions were raised before it in the first instance); *United States v. Lehigh Valley R. Co.*, 115 Fed. 373, 375 (to point as to what is not interstate shipment; case of mandamus; authority of Federal Court to compel shipment where terminal points within same State); cited and quoted from in *Kinney, In re*, 102 Fed. 468, 473 (as to there being no such thing as contempt of a subordinate administrative body and that determination by Circuit Court and refusal to obey are prerequisites; a case of power of collector of internal revenue); cited in *Ripon Knitting Works v. Schreiber*, 102 Fed. 810, 813 [(in quotation from *Debs* case cited above in this note) upon issue of contempt; in question as to power of court of bankruptcy to punish for contempt]; *Wyckoff, Seamans & Benedict v. Wagner Typewriter Co.*, 99 Fed. 158, 159 (case of refusal of stockholder as witness, to answer question tending to impeach, and declared not a case under Interstate Commerce Act); *United States v. Sweeney*, 95 Fed. 434, 450 [(in quotation from *Debs* case cited above in this note) as to denial of trial by jury to persons guilty of contempt]; *United States v. Bell*, 81 Fed. 830, 843 (generally as to protection of witnesses against inquisitorial system; case of examination before special pension examiner and incriminating testimony); *Gross, In re*, 78 Fed. 107, 109 (as to application to commissioners to Circuit Court to enforce obedience to subpoenas being a "case" to which the judicial power of the United States extends; a case as to constitutionality of act authorizing judges and clerks of United States Courts to issue subpoenas, when Commissioner of Pensions issues therefor); *Interstate Commerce Commission v. Cincinnati, N. O. & P. R. Co.*, 64 Fed. 981, 982 (to point that Interstate Commerce Commission is not a court but an administrative body lawfully created, exercising quasi-judicial powers and that its rulings entitled to highest respect); *King v. Asylum of Mass. Gen'l. Hosp.*, 64 Fed. 325, 339 (generally as to "disputes," "controversies" and "questions" included within the Federal jurisdiction).

punished by the court having jurisdiction of the person to punish for contempt. It was further held in connection with the point above mentioned that it was within the power of the State, and due process of law was not denied thereby, to require a corporation, doing business in the State, to produce before tribunals of the State books and papers kept by it in the State, although at the time the books might be outside the State; that so long as an opportunity to be heard is given to the party objecting to the notice to produce books and papers, before the proceeding to enforce such production is closed, due process of law is afforded, and if the State Court has construed the statute providing for such production to the effect that objections raised before a grand jury must be reported to the court for action, there is opportunity to be heard; that whether a notice to produce books and papers is broader than the State statute provides for is not a Federal question; that a corporation required to produce books and papers cannot refuse to produce them on the ground that it might incriminate them, it being for the court, after inspection, to determine the sufficiency of the objection and what portion, if any, of the books and papers produced should be excluded; that an objection that a notice to produce books and papers is too broad cannot be urged against the validity of an order adjudging the party refusing to comply guilty of contempt; that a notice to produce is not too broad where it is limited to books and papers relating to dealings with certain specified parties between certain specified dates; that a State statute providing for the production of books and papers by corporations does not deny to corporations the equal protection of the laws and that such a classification is a proper one; and, briefly stated, that a State statute providing for the production of their books and papers by corporations before courts, grand juries and other tribunals, and punishing corporations for failure to comply therewith for contempt is not unconstitutional as depriving corporations of their property without due process of law, or as denying them the equal protection of the laws, or as conferring judicial functions on non-judicial bodies, or as taking private property for public use

without compensation, or as constituting unreasonable searches and seizures or requiring corporations to incriminate themselves. An objection was also raised in this case that the statute provided no compensation for the time, trouble and expense imposed upon a corporation in a foreign State or country in collecting and sending the documents demanded to the State of Connecticut of said statute, and that it would thereby take, if enforced, private property for public use without compensation, and it was held that if the person producing the books and papers is entitled, under the general law of the State, to compensation as a witness, the failure of the statute requiring the production of books and papers of corporations to provide compensation to the corporation itself for the time, trouble and expense of such production does not amount to taking private property without compensation.⁴¹

§ 139. Jurisdiction of Courts in Respect to Railroad Commissions—Generally.

In Connecticut one injured in his legal rights by unlawful action, either of a municipal board, or of the board of railroad

⁴¹ Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. 425, aff'g 66 Atl. 790. The court, per Mr. Justice Peckham said as to this last point: "The prohibition to that effect is found in the Fifth Amendment to the Federal Constitution. Here again we meet the question whether that amendment, because of the subsequent adoption of the Fourteenth amendment, applies to a State proceeding, but for the reasons already stated we do not find it expedient to discuss it here. We do not say that in any event a witness is entitled to compensation in order to avoid the above constitutional provision, but the Supreme Court in this case has held that the general law of the State in reference to the compensation of witnesses applied to this statute. The answer which the counsel for the company makes is that neither the statute nor the notice required the attendance of anyone as a witness, but was merely an order for production for which no compensation was provided, either by the statute or under the general law. But the papers cannot walk into court of themselves, and when they are brought there by virtue of the notice to produce served on the company, and they are given to some person by the company for the purpose of such production, he has a right to be sworn as to the papers which he produces for purpose of identification, if nothing else, and the State Court has held that he is entitled as a witness to compensation."

where no exception is made to the facts as found by the commission, is in conflict with the State Constitution which gives the Supreme Court appellate jurisdiction only except of claims against the State.⁵² It is also held in the same State that the act creating the railroad commission is unconstitutional in providing for direct appeal to the Supreme Court from the commission as the appeal must in conformity with such constitutional provision be first taken to the Superior Court.⁵³ Again, in that State a statute which gives authority to a railroad commission to prescribe rules and regulations for the government of railroads, and provides that upon failure of any railroad company to make full and ample recompense for the violation of such rules and regulations, the commission should be entitled to proceed in the courts, after notice, to enforce the penalties to be prescribed therein for such violation, is valid without providing in detail the methods of procedure.⁵⁴

§ 141. Same Subject.

Under an Oklahoma decision on appeal from an order of the State Corporation Commission, the presumption obtains, by reason of the Constitution,⁵⁵ that the order is reasonable, just, and correct, and he who complains on appeal of such order has upon him the burden of establishing the unreasonableness,

⁵² *Pate (State ex rel. Board of Rd. Comm'rs) v. Wilmington & Weldon Rd. Co.*, 122 N. C. 877, 29 S. E. 334, 11 Am. & Eng. R. Cas. (N. S.) 671 (a case of a petition filed by certain citizens with the railroad commission for an order that defendant be required to establish a railroad station, with freight, express and telegraph offices at a specified place, which petition was dismissed on the ground of want of authority) citing *Caldwell (State ex rel. Caldwell) v. Wilson*, 121 N. C. 425, 28 S. E. 554, 61 Am. St. Rep. 672; *Leavell v. Western Union Teleg. Co.*, 116 N. C. 211, 21 S. E. 391; *Railroad Commissioners (State ex rel. Rd. Comm'rs.) v. Western Union Teleg. Co.*, 113 N. C. 213, 18 S. E. 389; *Mayo v. Western Union Teleg. Co.*, 112 N. C. 343, 16 S. E. 1006; *Express Co. (Atlantic Express Co.) v. Wilmington & Weldon Rd. Co.*, 111 N. C. 463, 16 S. E. 393.

⁵³ *State Railroad Commission v. Wilmington*, 122 N. C. 877, 29 S. E. 334, 11 Am. & Eng. R. Cas. (N. S.) 671, N. C. Const., Art. 4, § 12.

⁵⁴ *Express Co. (Atlantic Express Co.) v. Wilmington & Weldon Rd. Co.*, 111 N. C. 463.

⁵⁵ Section 22, Art. 9.

unjustness, or incorrectness of such order, which he may do by showing that the unreasonableness of the order appears affirmatively from the facts as certified by the commission, or that it is shown by evidence in the record, upon which the commission failed to make findings of fact, or upon which the commission erroneously found the facts.⁵⁶ Under a Texas decision where the railroad commission has adopted rules or regulations and a suit is instituted to test such decision of the commission, the ordinary rules of procedure prevail upon the question whether or not they are just and reasonable, and the complainant is not obligated to show that property is taken without due process of law and without proper compensation.⁵⁷ Under a Virginia decision, proceedings before the railroad commissioner⁵⁸ and his inability to have the cause of complaint corrected are conditions precedent to the exercise by the Circuit Courts of the jurisdiction conferred on them by said act. But when the

⁵⁶ Syllabus in *Missouri, Kansas & Texas Ry. Co. v. State* (Okla., 1909), 103 U. S. 613. The court per Hays, J. (at p. 615), said: "The Constitution requires the commission to certify, on appeal from any of its orders, the facts and reasons upon which the commission bases its order. Such requirement is made for the purpose of furnishing this court an aid in determining whether the order made is reasonable and just; and, while all acts of the commission are to be regarded as *prima facie* just, reasonable, and correct, its findings of fact and reason assigned for the making of an order, or refusal to make any order, are not conclusive upon this court, and, where there are no findings of fact by the commission affirmatively showing that an order made is reasonable and unjust, in the absence of any statute or rule of this court prescribing the procedure before the commission and on appeal here, we think the court should consider, not only the facts found by the commission, but also all the evidence in the record which fairly tends to support the action of the commission. The Constitution clothes the order of the commission with the presumption that it is *prima facie*, reasonable, just, and correct, § 22, art. 9, of the Constitution (§ 235, Bunn's ed.). On appeal the burden is upon appellant to overcome this presumption. This it may do by showing that the facts found affirmatively show the order to be unreasonable and unjust, or that there is evidence in the record upon which the commission has made no finding, or upon which it has incorrectly made findings of fact which show that such order is unreasonable and unjust."

⁵⁷ *Railroad Commission v. Houston & Texas C. R. Co.*, 90 Tex. 340, 33 S. W. 750. See *Railroad Commission v. Weld* (Tex. Civ. App.), 66 S. W. 122, 15 Tex. 5.

⁵⁸ Under act of March 3, 1892 (acts 1891-92, p. 965).

jurisdiction of such courts is properly invoked, they hear the cause *de novo*, and when the complaint is that two railroads companies fail to make proper connections, both companies must be made parties defendant by the commonwealth in order that the court may adjust all matters or cause of complaint. The fact that one of the companies is willing to adopt the suggestion of the commissioner, and to obey his directions, does not dispense with the necessity of making such company a party to the proceedings in the Circuit Court.⁵⁹ And in the same State an order of a Circuit Court,⁶⁰ requiring common carriers to make specified changes in their schedules so as to effect a given connection, should provide that they may thereafter agree upon a new schedule not in violation of law, and that, in the absence of such new schedule, either party may, after reasonable notice to the other and to the attorney for the commonwealth of the county in which the suit is pending, apply to the court, or to the judge in vacation, for any modification in its order that may be shown to be proper.⁶¹ In Wisconsin unless an order of the railroad commission is unlawful or unreasonable it will not be disturbed.⁶² Under a Federal decision the power to regulate the operation of railroads includes regulation of the schedule for running trains; such power is legislative in character, and the legislature itself may exercise it or may delegate its execution in detail to an administrative body, and where the legislature has so delegated such regulation the power of regulation cannot be exercised by the courts. So where the legislature of Hawaii has vested by statute the regulation of a railway company thereby incorporated in certain administrative officers, it is beyond the power of the courts to independently regulate the schedule of running cars by decree in a suit; and this is so held without deciding as to

⁵⁹ *Southern Ry. Co. v. Commonwealth*, 98 Va. 758, 2 Va. Sup. Ct. 620, 37 S. E. 294.

⁶⁰ Proceeding under the act of March 3, 1892, acts 1891-92.

⁶¹ *Southern Ry. Co. v. Commonwealth*, 98 Va. 758, 2 Va. Sup. Ct. 620, 37 S. E. 294.

⁶² *State ex rel. Northern Pac. Ry. Co. v. Railroad Commission* (Wis., 1909), 121 N. W. 919.

power of the courts to review the action of the administrative officers charged by the legislature with establishing regulations. In this case the question was whether the courts of the Territory of Hawaii had jurisdiction to issue an injunction to prevent the running of street railway cars at intervals of less than that of an existing schedule, on the ground that public convenience required the continuance of the existing schedule, in other words, whether the court had power to control and regulate the operations of the company.⁶³ The English High Court of Justice has no original jurisdiction over matters within the railway commissioners' jurisdiction, but can only enforce orders made by the latter under the Regulation of Railways Act.⁶⁴ And where railway commissioners sit in lieu of arbitrators under the provisions of said Regulation of Railways Act,⁶⁵ they exercise a jurisdiction not depending on the parties' consent, and an appeal lies to the Superior Court on questions of law.⁶⁶

142. Jurisdiction of Courts—Railroad Commissioners—Public Service Commission—Certificate of Public Convenience and Necessity.

In New York the determination of the board of railroad commissioners of that State whether or not a certificate should be issued that public convenience and necessity require the construction of a proposed railroad, does not constitute a subject

Honolulu Rapid Transit & Land Co., 211 U. S. 282, 53 L. ed. 186, 29 Ct. 55, rev'g 18 Hawaii, 553; §§ 833-871, chap. 66 of Rev. Laws of Hawaii. *Examine Atlantic Coast Line Rd. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 51 L. ed. 33, 27 Sup. Ct. 585.

Thatterly Iron Co. v. North Staffordshire Ry. Co. (1878), 3 Ry. & Can. 338; act of 1873, § 26.

act of 1873, § 8.

Northeastern Ry. Co. v. North British Ry. Co. (1897), 10 Ry. & Can. Cas. 82. Appeal under Railway and Traffic Act, 1888, § 17. So held the Court of Session.

no appeal from commissioners to Superior Court of Appeal under Railway and Traffic Act of 1888, § 17, being applicable under English Telegraph Act. *Postmaster Gen'l v. Corporation of Glasgow*, 10 Ry. & Can. 338.

for judicial revision.⁶⁷ The determination of a board of railroad commissioners under the railroad law of New York⁶⁸ that public convenience and necessity require the construction of a railroad, is not effective to confer any corporate rights upon the applicant until the certificate embodying the decision is filed in the office of the Secretary of State, and it is only then that the statute of limitations begins to run as to the right to review the determination of the board. Said commissioners in acting under the above statute⁶⁹ proceed judicially and are required to determine, at the outset, whether a corporation applying for a certificate is one *de jure*, by reason of a compliance with what the statute commands as essential to due incorporation. If the ten per cent of the minimum amount of capital stock has not been subscribed, nor paid in good faith and in cash, there has been no legal incorporation, and that question the board must determine. When no cash appears to have been paid in or received by the railroad company or by anyone for it, in compliance with the railroad law,⁷⁰ which requires an affidavit that ten per cent of the capital stock has been paid in good faith and in cash, the Appellate Division of the Supreme Court of New York may review the determination of the railroad commission upon that question and find that the affidavit was false, and, for that purpose, where the return includes the proceedings and testimony, that court may look into the evidence, and if it finds that it fails to support the determination of the board, may annul such determination. Such decision cannot be reviewed by the Court of Appeals.⁷¹ In another case in the same State it is held that where, after the former board of railroad commissioners issued to a railroad a certificate of public convenience and necessity and denied a

⁶⁷ *People v. Board of Railroad Comm'rs*, 175 N. Y. 516, 67 N. E. 1088, *aff'g* 81 N. Y. Supp. 20, 81 A. D. 242.

⁶⁸ Railroad Law, § 59 (Laws 1890, chap. 565, as am'd).

⁶⁹ Under § 59 thereof.

⁷⁰ Section 2 of Railroad Law.

⁷¹ *People ex rel. New York Central & Hudson River Rd. Co. v. Public Service Commission*, 195 N. Y. 157, 88 N. E. 261, *aff'g* 106 N. Y. Supp. 968, 122 App. Div. 283.

subsequent application by another railroad for a similar certificate, the second petitioner contends that its application should have been granted owing to the fact that since the prior determination conditions have materially changed in the locality, the Appellate Division in its discretion may remit the matter to the Public Service Commission for investigation and determination. It is a question as to whether the Supreme Court has power to order the Public Service Commission to issue a certificate of public convenience and necessity. But assuming that the court possesses that power, it has also power to remit the matter for a rehearing to the body possessing original jurisdiction; and the power of the Supreme Court to review a determination of the former board of railroad commissioners and its successor, the present Public Service Commission, has been exercised for so long a time that it is not an open question.⁷² On review of the determination of the State railroad commission not to issue a certificate of convenience and necessity for the construction of a belt line for freight around a city connecting different railroads, affidavits were presented showing that since the hearing before the commission one railroad was constructing a switching yard of great capacity and laying additional track along its passenger belt line which would soon be available for interchanging freight among the various

⁷² *Buffalo Frontier Terminal Ry. Co., Matter of*, 131 App. Div. 503, 115 N. Y. Supp. 483.

The Supreme Court of New York on review of proceedings on an application for the issuance of a certificate of public convenience and necessity for a railroad, having power to direct the Public Service Commission to issue the certificate, may also remit the matter for a rehearing to that body; and the power to remit a case for any purpose must carry with it the authority to determine in what manner and for what purpose the submission is made. *Labus in Buffalo Frontier Terminal Rd. Co., In re*, 115 N. Y. Supp. 483. It is urged with much earnestness that the determination of the Board of Railroad Commissioners is an administrative and not a judicial act, and the court has no power to review its decision. The power has been exercised so long a time that it is not an open question, and we deem it unnecessary to enter into any discussion on the subject." *Buffalo Frontier Terminal Co., Matter of*, 115 N. Y. Supp. 483, 489, per Spring, J. In this case the determination of the Board of Railroad Commissioners was set aside and a rehearing ordered by the Public Service Commission; McLennan, P. J., dissented.

railroad lines, and that other improvements by new lines are under way tending to obviate the necessity for new proposed lines. It also appeared that a rival company was granted a certificate which, except for objection which induced a reversal as to its certificate on certiorari, might be equally well equipped and located to satisfy the necessity, if it has since eliminated the objections, and might be entitled to the certificate. It was held that, notwithstanding the evidence before the railroad commission entitled petitioner to a certificate, the case would be remanded to the Public Service Commission, its successor,⁷³ for a rehearing on present conditions.⁷⁴

⁷³ Under Laws 1907, p. 937, chap. 429.

⁷⁴ Syllabus in *Buffalo Frontier Terminal Rd. Co., In re*, 115 N. Y. Supp. 483, 131 App. Div. 503.

"We do not deem it necessary to determine the question of the power of this court to order the Public Service Commission to issue a certificate of necessity to the petitioner. As bearing upon this subject, see, however, *Village of Ft. Edward v. Hudson Valley Rd. Co.*, 192 N. Y. 139, 84 N. E. 962; *Matter of Wood*, 181 N. Y. 93, 73 N. E. 561; *Matter of Rochester, Corning & Elmira Traction Co.*, 102 N. Y. Supp. 1112, 118 App. Div. 521; § 85, Public Service Commissions Law (Laws 1907, p. 937, c. 429), § 59 of Railroad Laws (Laws 1895, p. 317, c. 545). Passing the question of power, we think such an order would be an unwise exercise of discretion in view of the conditions existing. One rival company has already applied to that body for such certificate, and, if granted, it might render permission to the petitioner improper or unnecessary. The Board of Railroad Commissioners, believing a certificate should be granted, issued it to another competing company. The affidavits tend to show that conditions affecting the operation of railroads and the transportation of freight have materially changed since the determination made more than two years ago. It is a matter of current knowledge that the Public Service Commission of the second district has been devoting much time to the consideration of the many problems connected with the operation of the railroads in and about the city of Buffalo. It has the opportunity of frequent inspection of conditions prevailing, and is especially equipped for the solution of questions involving railroad construction and operation. We have no doubt as to the power of this court to relegate this matter to that body for investigation and determination. The petitioner asks that this court direct the commission to issue the certificate. Assuming that can be done, the power must also be lodged in this court to remit the matter for a rehearing to the body possessing original jurisdiction. The mode in which this court transfers the proceeding to the commission, and what directions it may make, relate wholly to the procedure. The power to remit for any purpose must carry with it the authority to determine in what manner and for what purpose the submission is made. In *People*

§ 143. Jurisdiction of Courts Over Rate Regulations—Generally.

While rates for the transportation of persons and property within the limits of a State are primarily for its determination,⁷⁶ and while it is not for the courts to go into the reasonableness of established water rates but resort must first be had to the body designated by law to fix proper rates,⁷⁶ nevertheless, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and, therefore, without due process of law, cannot be so conclusively determined by the legislature of a State, or by regulations adopted under its authority that the matter may not become the subject of judicial inquiry.⁷⁷ And in order to determine whether the rates as fixed furnish at least some compensation as a return for the services rendered by property used the courts may review the question of rates where they are not fixed by appropriate judicial proceedings wherein an opportunity to appear and defend has been afforded proper notice, and this applies irrespective of whether the rates are fixed by legislative power or otherwise than as above stated.⁷⁸ Again, courts have the power to inquire whether a body of rates prescribed by a legislature is unjust and unreasonable and such as to work a practical destruction of rights of

El. Bath & Hammondsport Railroad Company v. Public Service Commission et al., the appellate division annulled the determination of the Board of Railroad Commissioners (127 App. Div. 480, 112 N. Y. Supp. 133), and the decision was affirmed in the Court of Appeals, not yet reported. Upon application that court modified its order, 'so as to award a rehearing before the Public Service Commission,' although the determination reversed the action which was made by its predecessor, the Railroad Commission." *Also Frontier Terminal R. Co.*, In re, 115 N. Y. Supp. 483, 489, 131 App. Div. 503, 510, per Spring, J.

Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, 30 Chicago Law Review, 243, 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. 888.

Osborne v. San Diego Land & Town Co., 178 U. S. 22, 20 Sup. Ct. 860, 45 L. ed. 961.

Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, 30 Chicago Law Review, 243, 171 U. S. 361, 43 L. ed. 197, 18 Sup. Ct. 888.

San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. 20.

property, and if found to be so to restrain its operation, because such legislation is not due process of law. This applies to a statute regulating the rates to be charged by a corporation controlling a public highway; and where a *prima facie* case exists invalidating such enactment, and if a defense arises under an act of Congress or under the Constitution, the question whether the plea or answer sufficiently sets forth such a defense is a question of Federal law, the determination of which cannot be controlled by the judgment of the State Court.⁷⁹

§ 144. Same Subject.

When a State legislature establishes a tariff of railroad rates so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, the Federal Courts may treat it as a judicial question and hold such legislation to be in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and as depriving it of the equal protection of the laws.⁸⁰ And although the determination of whether a railway rate prescribed by a State statute is so low as to be confiscatory involves a question of fact, its solution raises a Federal question, and the sufficiency of rates is a judicial question over which the proper Circuit Court has jurisdiction, as one arising under the Constitution of the United States. And whether a State railroad rate statute, although on its face relating only to intrastate rates, is an interference with interstate commerce also raises a Federal question which cannot be considered frivolous.⁸¹ It is held, however, that no general supervisory

⁷⁹ *Covington & Lexington Turnpike R. Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198.

⁸⁰ *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567.

⁸¹ *Young, ex Parte*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 441, citing *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S. 167, 172, 44 L. ed. 417, 20 Sup. Ct. 336; *Smyth v. Ames*, 169 U. S. 466, 522, 18 Sup. Ct. 418, 42 L. ed. 818; *Covington & Lexington Turnpike R. Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 569; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047; *Chicago, M. & St. P. R.*

isdiction is vested in the courts in respect to freight and passenger rates.⁸² But the power is vested in the courts to ultimately determine in respect to discriminating rates the questions of right and justice as between the parties.⁸³

§ 145. Legislative and Judicial Functions as to Rate Regulation—Distinctions.

There is a distinction between the power to prescribe a tariff rates and charges and the power to determine whether existing and prescribed rates and charges are unjust or reasonable; the former is a legislative the latter a judicial function. The courts cannot prescribe or fix a schedule of rates and charges for public or quasi-public service, or determine whether one rate is preferable to another; their jurisdiction is to construe or apply the law or regulation after it is made, or to determine its constitutionality or prevent its enforcement, nor can the legislature place its own enactments beyond the constitutional jurisdiction of the courts, nor foreclose their judgments by prescribing such a tariff or schedule as to preclude an inquiry into their reasonableness, or as to the constitutionality of the legislative enactment.⁸⁴ So a duty which is not a judicial but a legislative or administrative one, such as fixing railroad transportation rates, cannot be forced on the judiciary contrary to the State Constitution.⁸⁵ A court may conduct a judicial investigation in aid of a legislative regulation as to rates to be paid for water and determine the reasonableness thereof and what rates are reasonable with regard at least to existing rights and grievances; and a statute providing for a petition by selectmen of a town or any persons feeling themselves aggrieved, to the supreme judicial court, to

Minnesota, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 462, 702; *Hastings v. Ames* (U. S. C. C. A.), 68 Fed. 726.

Maritan River R. Co. v. Middlesex & S. Traction Co., 70 N. J. L. 732, 11 L. 332.

Interstate Commerce Commission v. East Tennessee V. & G. Ry. Co., 100 U. S. 107.

Western Union Teleg. Co. v. Myatt (U. S. C. C.), 98 Fed. 335.

Teenerson v. Great Northern R. Co., 69 Minn. 353, 72 N. W. 713, 8 Am. R. Cas. (N. S.) 559.

fix the rates and authorizing two or more judges of said court to establish maximum rates was held constitutional.⁸⁶

§ 146. Equity Jurisdiction—Railroad, etc., Rates—Obligation of Contracts—Injunction—Discrimination.

A court of equity has no power to establish railroad rates.⁸⁷ But in view of the continuous confusion, risks and multiplicity of suits, which would result from, and the public interests and vast number of people which would be affected by, the enforcement of an ordinance reducing the rates of fare of street railways, which ordinance the companies claim is unconstitutional as impairing the obligation of the contracts resulting from the ordinances granting the franchises, a court of equity has jurisdiction of an action to enjoin the enforcement of the ordinance, especially when the ordinance affects only a part of the system and would engender the enforcement of two rates of fare over the same line leading to dangerous consequences. The passage by the municipality of an ordinance affecting franchises already granted under prior ordinances amounts to an assertion that the legislative authority vested in it to pass the original ordinance gave it the continued power to pass subsequent ordinances, and it cannot assail the jurisdiction of the Circuit Court on the ground that its action in impairing the contracts which resulted from prior ordinances was not an action by authority of the State. In this case it was held that the consolidated ordinance of February, 1885, of the city of Cleveland, and ordinances thereafter passed by the municipality and accepted by the companies, constituted such binding contracts in respect to the rate of fare to be exacted upon the consolidated and extended lines of the railroad companies as to deprive the city of its right to exercise the reservations in the original ordinances as to changing the rates of fare; and the ordinance of October 17, 1898, reducing the rate of fare to be charged, was void and unconstitutional within the impair-

⁸⁶ Janvrin, Petitioner, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319.

⁸⁷ Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 413, 420, 38 L. ed. 1014, 14 Sup. Ct. 1047, followed in s. c., 154 U. S. 420, 38 L. ed. 1031, 14 Sup. Ct. 1062.

ment clause of the Constitution of the United States.⁸⁸ If citizens of different States are affected by a claimed illegal reduction of freight rates the jurisdiction of a Federal court of equity over the question is not taken away by the act of the legislature of one of the States in fixing such rates instead of authorizing a commission so to do.⁸⁹ A public service corporation may be prevented from discrimination in the matter of rates, and equity has jurisdiction of such corporation to require it to furnish its services at reasonable and uniform rates to all citizens alike.⁹⁰

§ 147. Extent of Judicial Interference as to Rate Regulations.

It is asserted that the extent of judicial interference is protection against unreasonable rates.⁹¹ And the rule declared by the Federal Supreme Court is that although rates when fixed by legislative authority for public service corporations should allow a fair return upon the reasonable value of the property at the time it is being used, still the statute will not be declared invalid by the courts unless the rates are so unreasonably low that their enforcement would amount to the taking of property for public use without compensation.⁹² So while courts may refuse to enforce legislation on constitutional grounds the power or jurisdiction invoked should be exercised only in the rarest cases, and where a public service corporation refuses to observe an ordinance fixing in detail the maximum water rates to be charged by the company, and prefers to go into

⁸⁸ *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 48 L. ed. 102, 24 Sup. Ct. 756, followed in *Cleveland v. Cleveland Electric Ry. Co.*, 194 U. S. 48, 48 L. ed. 1109, 24 Sup. Ct. 764.

⁸⁹ *Ames v. Union Pac. R. Co.* (U. S. C. C.), 64 Fed. 165, 4 Inters. Comm. Rep. 835.

⁹⁰ *Wright v. Glen Telephone Co.*, 95 N. Y. Supp. 101, 48 Misc. 192, aff'g 100 N. Y. Supp. 85.

⁹¹ *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 35 L. ed. 515, 12 Sup. Ct. 250.

⁹² *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 137, citing *San Diego Land & Town Co. Cases*, 174 U. S. 839, 43 L. ed. 1154, 19 Sup. Ct. 257, s. c., 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. 571.

court with a claim that the ordinance is unconstitutional, it must, where such enactment has been held otherwise valid, be prepared to show to the court's satisfaction that the ordinance would necessarily be so confiscatory in its effect as to violate the Federal Constitution.⁹³ Again, the judiciary ought not to interfere with the collection of rates, for the use of water, established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public.⁹⁴

§ 148. Jurisdiction of Courts Before Rate Legislation Goes Into Effect.

Except in very clear cases courts should not interfere with State rate legislation before the legislation goes into effect.⁹⁵ So the making of a rate by a legislative body, after hearing the interested parties, is not *res judicata* upon the validity of the rate when questioned by those parties in a suit in a court. Litigation does not arise until after legislation; nor can a State make such legislative action *res judicata* in subsequent litigation.⁹⁶

§ 149. Jurisdiction of Courts in Respect to Railroad Commissions—Rates.

If a State railroad commission attempts to enforce unreasonable rates its power is not so purely legislative in its nature as to preclude its being amenable to the court.⁹⁷ So a citizen

⁹³ *Knoxville, City of, v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371, cited in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41.

⁹⁴ *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 154, 191 Sup. Ct. 804, aff'g 74 Fed. 79.

⁹⁵ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 392.

⁹⁶ *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

⁹⁷ *Southern Pac. Co. v. Board of Railroad Commissioners* (U. S. C. C.), 78 Fed. 236.

"Jurisdiction is given to the Circuit Court in suits involving the requisite amount, arising under the Constitution or laws of the United States (1 U. S.

of another State who feels himself aggrieved and injured by the rates prescribed by a railroad commission may seek his remedy in equity against the commissioners in the Circuit Court of the United States in the State, and the Circuit Court has jurisdiction over such a suit under the statutes regulating its general jurisdiction, with the assent of the State, expressed in the act, creating the commission; and it is within the power of a court of equity in such case to decree that the rates so established by the commission are unreasonable and unjust, and to restrain their enforcement; but it is not within its power to establish rates itself, or to restrain the commission from again establishing rates.⁹⁸ To the same effect is another decision wherein it is held in almost the same language that it is not only within the power but it is also the duty of the courts to inquire whether rates prescribed by a State railroad commission are unjust and unreasonable, such as to constitute an unconstitutional invasion of property rights, and, if so, to restrain their enforcement; but they are not authorized to revise or change a body of rates, which is a legislative or administrative, rather than a judicial function.⁹⁹ Though the making of carriers' rates is a legislative and not a judicial act, within the jurisdiction of the courts, and courts cannot make rates on

Comp. St., p. 508) and the question really to be determined under this section is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law, although that question might incidentally involve a question of facts, the solution nevertheless is one which raises a Federal question. See *Hasting v. Ames* (C. C. A., 8th Circuit), 68 Fed. Rep. 726. The sufficiency of rates with reference to the Federal Constitution is a judicial question, and one for which Federal Courts have jurisdiction by reason of its Federal nature. *Chicago, etc., R. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 10 Sup. Ct. 702; *Regan v. Farmers', etc., Co.*, 154 U. S. 369, 399, 38 L. ed. 1014, 14 Sup. Ct. 1047; *St. Louis, etc., Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567; *Covington, etc., Turnpike Road Company v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 10 Sup. Ct. 198; *Smyth v. Ames*, 169 U. S. 466, 522; *Chicago, etc., Co. v. Hopkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. 336. *Regan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. 1047, followed *Id.*, 154 U. S. 420, 38 L. ed. 1031, 14 Sup. Ct. 1062. *Syllabus in Trammell v. Dinsmore*, 102 Fed. 794, 42 C. C. A. 623; *Dinmore v. Southern Exp. Co. & Georgia Rd. Commission, Id.*, *aff'd* 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. 45.

a final hearing, a court, for the purpose of requiring complainant, who has obtained a preliminary injunction against alleged confiscatory rates, to do equity, and prevent the imposition of extortionate rates for carriage, may fix maximum rates beyond which complainant shall not go during the pendency of the litigation, and make the compliance with such maximum rates a condition on which the temporary injunction will be continued.¹

§ 150. Same Subject.

Equity has jurisdiction, however, on the ground of preventing a multiplicity of suits, to restrain a State board of railroad commissioners from enforcing a schedule of rates advertised to be put in force on a certain day; and a preliminary injunction should be granted where the probable effect of such threatened enforcement of the schedule of rates would be that dividends from the operation of the roads affected would be destroyed, especially where a person injured by overcharges would, under the statute, be entitled to recover treble damages.² Under a decision rendered in 1899 in the Federal Supreme Court it appeared that: The State of South Dakota having passed an act providing for the appointment of a board of railroad commissioners, and authorizing that board to make a schedule of reasonable maximum fares and charges for the transportation of passengers, freight and cars on the railroads within the State, provided that the maximum charge for the carriage of passengers on roads of the standard guage should not be greater than three cents per mile; and that board having acted in accordance with the statute, and having published its schedule of maximum charges, the Chicago, Milwaukee & St. Paul Railway Company filed the bill in this case in the Circuit Court of the United States for the District of South Dakota, seeking to restrain the enforcement of the schedule. The railroad commissioners answered fully, and testimony was

¹ Syllabus in *Arkansas Railroad Rates*, In re (U. S. C. C.), 168 Fed. 720.

² *Chicago & Northwestern R. Co. v. Dey* (U. S. C. C.), 35 Fed. 866, 2 Inters. Com. Rep. 325, 4 Rd. & Corp. L. J. 465, 1 L. R. A. 744.

then before an examiner upon the issues made by the pleadings. This testimony was reported without findings of fact and conclusions of law. The case went to hearing. The judge, without the aid of a master, examined the pleadings and the merits of proof. He made findings of fact and conclusions of law; delivered an opinion; and rendered a decree dismissing the bill. It was held by the Federal Supreme Court: That either the findings made by the court, nor such facts as were stated in its opinion, were sufficient to warrant a conclusion upon the question whether the rates prescribed by the defendants were unreasonable or not, and that the process by which the court came to its conclusion was not one which could be relied upon. That there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining thus the net earnings, could the true effect of the reduction of rates be determined.³ It is held in Kentucky that though a railroad commission may be empowered under a State Constitution to grant relief in "special cases" from the operation of such provision which prohibits a greater charge on common carriers for a short than for a long haul, still the refusal of such commission to grant the relief is held not reviewable by the courts.⁴ A claim for repayment of excessive freight charges must be enforced in a common-law action; and where a railroad commission, acting without jurisdiction or over in the premises, orders such excessive charges to be refunded the remedy is not that provided by the statute creating the commission whereby such board is empowered, in case of a violation of its lawful orders or upon refusal or neglect of a

³ *Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417. Cited in *Minneapolis & St. Louis R. Co. v. Mesota*, 186 U. S. 257, 262, 22 Sup. Ct. 900, 46 L. ed. 1151; *Chesapeake & Potomac Teleg. Co. v. Manning*, 186 U. S. 238, 250, 46 L. ed. 1144, 22 Sup. Ct. 881; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 85, 22 Sup. Ct. 46 L. ed. 92.
⁴ *Louisville & N. R. Co. v. Commonwealth*, 104 Ky. L. Rep. 1380, 43 L. R. 41, denying rehearing, 104 Ky. 226, 46 S. W. 707, 20 Ky. L. Rep. 1380, 104 R. A. 541, Ky. Const., § 218.

railroad company to obey the same to complain to the State Circuit Court in equity and said court being thereupon authorized to hear and determine the matter upon notice given the company.⁵

§ 151. Same Subject—Where Resort Must First Be Had.

A court of equity is without power to interfere by injunction to control in advance the exercise of the legislative power, conferred on a State railway commission by the Constitution and statutes of a State, to fix reasonable and just rates for the transportation of property within the State, by restraining such commission from considering or acting upon the question of establishing new rates on any given commodities or from giving notice to a railroad company of any order which may be adopted establishing such rates.⁶ Under the Texas statute a shipper is not obligated in case of excessive freight charges collected by a carrier to apply for relief to the railroad commission but may sue therefor and for penalties provided.⁷ Where a State railroad commission, which is granted power by the State Constitution to make and enforce rates, enacts and attempts to enforce rates which are so low as to be confiscatory, the proper remedy is by a bill in equity to enjoin such enforcement, but such a suit should not be commenced until the rate has been fixed by the body having the last word.⁸ It is likewise determined that a State railroad commissioner may be enjoined from proceeding to fix rates under a State statute. But although under a State statute the duty of enforcing the rates it may fix is vested in a railroad commission yet the rates

⁵ *Oregon Rd. Comm'rs v. Oregon Rd. & Nav. Co.*, 17 *Oreg.* 65, 19 *Pac.* 702, 2 *L. R. A.* 195.

⁶ *Syllabus in Chicago, Burlington & Quincy Rd. Co. v. Winnett* (U. S. C. C. A.), 162 *Fed.* 242. Compare *Macon Grocery Co. v. Atlantic Coast Line Rd. Co.* (U. S. C. C.), 163 *Fed.* 738.

⁷ *Texas & New Orleans Rd. Co. v. Sabine Tram Co.* (Tex. Civ. App., 1909), 121 *S. W.* 256, *Rev. Stat.*, 1895, Art. 568, provides that persons "may" apply to commission, and Art. 4575 authorizes suit for damages and penalties in such cases.

⁸ *Prentiss v. Atlantic Coast Line Co.*, 211 *U. S.* 210, 29 *Sup. Ct.* 67, 53 *L. ed.* 150.

must be fixed before alleged consequences, such as threatened multiplicity of suits, and irreparable injury as grounds for equity jurisdiction and an injunction, can be availed of.⁹

§ 152. Same Subject—Appeal to State Supreme Court before Suing in Federal Circuit Court.

While a party does not lose his right to complain of action under an unconstitutional law by not using diligence to prevent its enactment, on a question of railroad rates, when an appeal to the Supreme Court of the State from an order of the State Corporation Commission fixing such rates is given by the State constitution, it is proper that dissatisfied railroads should take the matter to the Supreme Court of their State, before bringing a bill in the Circuit Court of the United States, and where the circumstances of the case justify it action on such a bill will be suspended to await the result of such an appeal.¹⁰

§ 153. Jurisdiction of Courts in Respect to Railroad Commissions—Rates—When Constitutional Question Not decided.

Where a bill, brought by a railroad company in the Federal Circuit Court to enjoin the enforcement of an order by a State railroad commission providing maximum rates on transportation of all commodities upon a railroad to and from all points within a State, not only alleges that the statute creating the commission, but also the order of the commission sought to be enjoined, deprives complainant of its property without due process of law, and also violates other provisions of the Constitution, the Circuit Court obtains jurisdiction without reference to the particular violation of the Fourteenth Amendment. The rule of the Federal Supreme Court is, not to decide constitutional questions if the case can be decided without doing so, and when it can dispose of the case by construction of the

McChord v. Louisville & N. R. Co., 183 U. S. 483, 22 Sup. Ct. 165, 46 L. 289, *rev'g* 103 Fed. 216.

Prentiss v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. 150.

statute and on the lack of authority given by such statute to make the order complained of, it will do so rather than on the constitutional questions involved, and even though the highest court of the State has not construed the statute involved the Federal Supreme Court must, in a case of which it has jurisdiction, construe it.¹¹

§ 154. Public Service Commission—Right to Appeal—Certiorari—Nature of Powers.

The Public Service Commission of New York is entitled to prosecute an appeal from an order of the Appellate Division of the Supreme Court which annulled its determination denying an application of a railroad company for permission to construct and operate an extension of its road. The commission having determined that the public interest required the construction and operation of a railroad upon the route over which the relator had acquired a franchise, recommended, however, that the permission and approval of the commission be withheld because of the limitations imposed by the municipal authorities of the city of New York upon the franchise contract. It was held, that so far as the consent of the municipal authorities to the construction of the proposed line may be limited by conditions which are in conflict with the provisions of the Public Service Commissions Law, the statute must prevail and the Public Service Commission was without authority to refuse to the relator the certificate provided for in § 53 of said Public Service Commissions Law.¹² It is held in New York

¹¹ *Siler v. Louisville & Nashville Rd. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. 451. A case of construction of Kentucky Railroad Commission Law, distinguishing *Barney v. City of New York*, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. 502.

¹² *People ex rel. South Shore Traction Co. v. Willcox*, 196 N. Y. 212, aff'g 133 App. Div. 556. The syllabus to the report of this case in the New York Supplement reads as follows: The Public Service Commission is bound to approve the building of a street railroad as provided by Public Service Commission Law, Laws 1907, p. 920, chap. 429, § 53, in all cases where the local authorities have granted the consent provided for by the Constitution, Art. 3, § 18, as supplemented by the Railroad Law (Laws 1890, p. 1108, chap. 565), as amended by the Laws of 1907, p. 203, chap. 156, §§ 1, 91, and

at a determination of the Public Service Commission establishing a joint fare for passengers on two connecting independent street railroad corporations and apportioning such fare between them is quasi-judicial in its nature, and reviewable by the common-law writ of certiorari; and a motion to quash or modify a writ of certiorari to review the determination of an inferior tribunal may be made in the Appellate Division of the New York Supreme Court.¹³

The commission has determined, as the statute provides, that the proposed construction is "necessary and convenient for the public service," though it does not approve the terms imposed by the local authorities. *People v. Willcox*, 118 N. Y. Supp. 248, 133 App. Div. 556.

People ex rel. Joline v. Willcox, 113 N. Y. Supp. 861, 129 App. Div. 7.

The court, per Patterson, P. J., at pp. 862 *et seq.* of Supp. and pp. 268 *et seq.* of App. Div., said: "It is not claimed by the moving party that the action by the Public Service Commission in making orders now brought to the attention is beyond some power of review by the courts, but it is insisted that such review may only be had in independent proceedings, either by way of injunction to restrain the commission from enforcing the order or by compliance to an application made by the commissioners to compel compliance with it by mandamus or by defense to an action of law to enforce a penalty for a violation of it and thus to bring before the court upon new evidence all questions that might arise and could be litigated respecting the validity and enforceability of the order objected to. The question, therefore, now before the court, is whether a writ of certiorari may be issued to review the action of the commission in making the order complained of, or must the relators be content with some other remedy. In the act of the legislature constituting the Public Service Commission (Laws 1907, p. 889, chap. 429) there is no specific method pointed out by which the action of that commission can be brought within the judicial cognizance of the courts of the State. There is no express provision made either for a review of the proceedings or for an appeal from its orders. The writ of certiorari is regulated as to its allowance in proceedings thereunder, by the Code of Civil Procedure, which provides for what may be called certain statutory writs, but which also preserves the common-law writ. Unquestionably the common-law writ can only be issued for the purpose of reviewing acts either judicial or quasi-judicial in their nature, and official acts that are purely executive, legislative, administrative or ministerial in their character are not subject to review by such writ; it is scarcely worth while to cite authorities to so elementary a proposition. The inquiry, therefore, now is whether the acts of the Public Service Commission in the proceedings which led up to and eventuated in making the orders now sought to be reviewed are purely and exclusively executive, legislative, administrative or ministerial, or are judicial or quasi-judicial. Making the order now sought to be reviewed the Public Service Commission acted under the authority of a provision of § 49 of the act instituting the

§ 155. Jurisdiction of Courts—Suit Against Railroad Commissioners, etc.—Whether Suit Against State.

Where a State railroad commission, which is granted power commission (chap. 429, p. 917, Laws 1907;) which in part reads as follows 'The commission shall have power by order to require any two or more common carriers or railroad corporations whose lines, owned, operated, controlled or leased, from a continuous line of transportation or could be made to do so by the construction and maintenance of switch connection, to establish through rates and joint rates, fares and charges for the transportation of passengers, freight and property within the State as the commission may, by its order, designate; and in case through routes and joint rates be not established by the common carriers or railroad corporations named in any such order within the time therein specified, the commission shall establish just and reasonable rates, fares and charges to be charged for such through transportation, and declare the portion thereof to which each common carrier or railroad corporation affected thereby shall be entitled and the manner in which the same shall be paid and secured.' The proceeding was within the terms of the statute. The commission acted upon its own initiative, as it was also authorized to do. The procedure was apparently in conformity with provisions of the act relating to that subject and rules and regulations which the commission was authorized to adopt. * * * If we were to have regard only, on the present motion, to what appears in the petition and in the orders of the commission, it would be evident that their inquiry and action in the premises was judicial in its nature and that it was substantially acting as a court. It is true that it has been decided by courts of high authority that the mere fixing of rates by a commission intrusted with such power by law is legislative in its character, as in the very recent case of *Prentis v. Atlantic Coast Line Co.* (and companion cases decided November 30, 1908), 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150. In passing upon the nature of the powers devolved upon the State Corporation Commission of Virginia, Mr. Justice Holmes, writing the opinion of the court in those cases, remarks that whether the proceedings are to be regarded as legislative in their character or otherwise does not depend upon the dominant character of the body in which they may take place, but upon the character of the proceedings themselves. But looking beyond what is disclosed by the papers now before the court, and examining the act itself by which the Public Service Commission is established and its powers conferred, and having regard to the decisions of the courts in this State applicable to the subject, the conclusion seems to be necessary that the proceedings and order, the subject of the present inquiry, are judicial in their nature. * * * It appears to us that the power granted to and exercised by the Public Service Commission in the matter now under consideration includes very much more than what may be called a mere legislative act of fixing rates. There is involved the compulsion of two lines of railway to operate their roads jointly, and there is the judicial or quasi-judicial act of ascertaining and determining a proportionate share of a joint rate to be allowed to each operating company. In such a proceeding there seems to us

by the State Constitution to make and enforce rates, enacts and attempts to enforce rates which are so low as to be confiscatory, the proper remedy is by bill in equity to enjoin such that there necessarily arises a controversy—one to be determined by judicial methods, dependent upon evidence and the establishment of facts. The commission is clothed with the power which formerly resided in the railroad commission of the State and the gas committee, and acts of a character kindred to those now the subject of consideration have been regarded as judicial in their nature, as for instance in the case of *People ex rel. Loughran v. Railroad Commissioners*, 158 N. Y. 421, 53 N. E. 163, where it was held that the State Board of Railroad Commissioners, in consenting, under the power conferred upon them by the railroad law, to the discontinuance of a station on a line of railway, was not an act merely of administration, but it was judicial in its character and might be reviewed by the common-law writ of certiorari. In that case no right of review was given expressly by the statute; but the court remarked that a common-law writ of certiorari, might be issued to review the determination of inferior tribunals and officers acting under the authority of a statute to correct errors of law affecting the property rights of the parties, and that in consenting to a discontinuance of the station the Board of Railroad Commissioners acted judicially, citing as authority *People v. New York, Lake Erie & Western Rd. Co.*, 104 N. Y. 58, 38 N. E. 856, 58 Am. Rep. 484. The acts of the commission were judicial because the law impliedly required it to decide a question of fact, and also required their judgment upon evidence determining whether the consent could be given or not. The question was between the public patronizing the station and the inconvenience to the railroad company in maintaining and stopping its trains thereat. In *People ex rel. Linton v. Brooklyn Heights Rd. Co.*, 172 N. Y. 90, 64 N. E. 788, which was a case relating to the discontinuance of continuous train service, the Board of Railroad Commissioners was authorized to determine whether the mode of operating the road and conducting its business was reasonable and expedient; and the court of appeals held that the action of the commission was reviewable by certiorari, and that the duty of examining the facts rested upon the appellate division. In the case of *Stewart v. Railroad Commissioners*, 160 N. Y. 202, 54 N. E. 77, the question was whether certain duties devolving upon the railroad commission were administrative and not judicial. That was a case which involved the issuance of a certificate of public necessity for the construction of a railroad, a matter which is very closely akin to that of a joint rate. In that case it was argued with great persistence that the statute conferred upon the railroad commissioners a duty which was administrative and which the courts had no power to review. In its opinion the court says: 'The issuance of a common-law writ of certiorari to review the judicial determinations of inferior judicial tribunals and officers acting judicially under authority of statute, to correct errors of law affecting property rights of the parties, has for a long time formed a part of our judicial procedure. *Starr v. Trustees of Rochester*, 6 Wend. (N. Y.) 564; *People ex rel. Coughran v. Railroad Commissioners*, 158 N. Y. 421, 53 N. E. 163, and cases cited. Counsel has, therefore,

enforcement, and such a suit against the members of the commission will not be bad as one against the State, but it should not be commenced until the rate has been fixed by the body

found it necessary to call the duty enjoined upon the railroad commissioners by § 59 of the railroad law something else than a judicial duty, in order to obtain even the suggestion of a foundation upon which to construct an argument introduced to convince the mind that such a determination as this is not reviewable by certiorari. But it is clear that if the duty enjoined upon the Board of Railroad Commissioners by this section calls upon them to decide some question of fact every time there is an application made to them for the issuing of the certificate authorized by it, then in the making of that decision it acts judicially, notwithstanding there may be closely interwoven with it certain administrative or ministerial functions that must be also exercised.' In the recent and very instructive case of *Village of Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123, 83 N. E. 693, it was held in substance, that while the fixing of maximum rates for gas and electric light corporations by a commission, created by Laws 1905, p. 2092, chap. 737, and to whose powers the present Public Service Commission succeeded is fixed in the State legislature, nevertheless the power is not inherently and exclusively legislative; that what is intrusted to the commission is the duty of ascertaining facts and, after a public hearing, determining what is a reasonable maximum rate. As we understand the opinion of the court in that case, a commission authorized by the legislature to fix rates is in a sense acting legislatively, yet the procedure by or through which they reach a result is in its nature judicial or quasi-judicial. Indeed, it would seem, from the provision of § 59 of the Public Service Law, that it was within the contemplation of the legislature, in passing the act, that the action of the commission in many cases might come before the courts by independent proceedings instituted for a review. Section 59 provides very drastic penalties for violation of orders of the commission; but it proceeds to say that in an action to recover a penalty and forfeiture brought by the commissioners under the act, if the defendant in such an action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order of the commission the defendant was actually and in good faith prosecuting a suit, action, or proceeding in the courts to set aside such order, the court shall remit the penalties or forfeitures incurred during the pendency of such suit, action, or proceeding. The only proceeding available to this petitioner would be that of certiorari, but that is not conclusive of the subject. We think that, in view of the whole trend of the decisions of the highest court of this State with reference to the nature of proceedings of public service commission in such matters as those acted upon in the case now before us, we must hold that the commission has acted judicially or quasi-judicially, and that the appropriate method of review is by certiorari, and that hence the motion to vacate the writ must be denied. Our decision goes no further than to determine that the particular order to which the petitioner now objects and the proceedings leading to its issuance may be reviewed by certiorari. All concur."

made by the State, and suits by the vendors against the State officers carrying on or winding up the business are suits against the State and, under the Eleventh Amendment, beyond the jurisdiction of the Federal Courts; and this applies to suits by commissioners to wind up the State Liquor Dispensary in South Carolina.¹⁸ In the very important Young case¹⁹ it was held: that the Attorney General of the State of Minnesota, under his common-law power and the State statutes, has the same authority imposed upon him of enforcing constitutional provisions as the Attorney General of the State of South Carolina. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150. *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. ed. 535, 19 Sup. Ct. 59, citing *Fitts v. McGhee*, 172 U. S. 516, 529, 530, 43 L. ed. 535, 19 Sup. Ct. 59; *Scott v. Donald*, 165 U. S. 107, 112, 41 L. ed. 648, 17 Sup. Ct. 262. *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 210, 21 Sup. Ct. 51. *Western Union Telegraph Co. v. Myatt*, 98 Fed. 335. *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. 167, rev'g 161 Fed. 152, a case of action against commissioner under dispensary law; action against State of South Carolina dispensary law; Eleventh Amendment; commissioner under State dispensary law to wind up affairs. *Young v. Ex parte*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 441.

statutes of the State and is a proper party defendant to a suit brought to prevent the enforcement of a State statute on the ground of its unconstitutionality; that the attempt of a State officer to enforce an unconstitutional statute is a proceeding without authority of and does not affect the State in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.²⁰

²⁰ In this case the court, per Mr. Justice Peckham, said: "The question of jurisdiction, whether of the Circuit Court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the Circuit Court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. * * * This inquiry necessitates an examination of the most material and important objection made to the jurisdiction of the Circuit Court, the objection being that the suit is, in effect, one against the State of Minnesota, and that the injunction issued against the Attorney General illegally prohibits State action, either criminal or civil, to enforce obedience to the statutes of the State. This objection is to be considered with reference to the Eleventh and Fourteenth Amendments to the Federal Constitution. The Eleventh Amendment prohibits the commencement or prosecution of any suit against any one of the United States by citizens of another State or citizens or subjects of any foreign State. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws.

"The case before the Circuit Court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant. It applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. 504. It was adopted after the decision of this court in *Chisholm v. Georgia* (1793), 2 Dall. 419, where it was held that a State might be sued by a citizen of another State. Since that time there have been many cases decided in this court involving the Eleventh Amendment, among

being *Osborn v. United States Bank* (1824), 9 Wheat. (22 U. S.) 738, 857, 6 L. ed. 204, which held that the Amendment applied only to those cases in which the State was a party on the record. In the subsequent case *Governor of Georgia v. Madrazo* (1828), 1 Pet. (26 U. S.) 110, 122, 123, 4 L. ed. 73, that holding was somewhat enlarged, and Chief Justice Marshall reversing the opinion of the court, while citing *Osborn v. United States Bank*, *supra*, said that where the claim was made, as in the case then before the court, against the Governor of Georgia as governor, and the demand was made upon him, not personally, but officially (for moneys in the treasury of the State and for slaves in the possession of the State government), the case might be considered as the party on the record (page 123), and therefore the suit could not be maintained.

Davis v. Gray, 16 Wall. (83 U. S.) 203, 220, 21 L. ed. 447, reiterates the rule of *Osborn v. United States Bank*, so far as concerns the right to join a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

In *Virginia Coupon Cases*, 114 U. S. 270, 296, 29 L. ed. 185, 5 Sup. Ct. 962 (Poindexter v. Greenhow), it was adjudged that a suit against a collector who had refused coupons in payment of taxes, and, under color of void law, was about to seize and sell the property of a taxpayer for payment of his taxes, was a suit against him personally as a wrongdoer and not against the State.

Hagood v. Southern, 117 U. S. 52, 67, decided that the bill was in substance a bill for the specific performance of a contract between the complainants and the State of South Carolina, and, although the State was not named as a party defendant, yet being the actual party to the alleged contract the performance of which was sought and the only party by whom it could be performed, the State was, in effect, a party to the suit, and it could not be maintained for that reason. The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State.

The cases upon the subject were reviewed, and it was held, in *In re Ames*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. 164, that a bill in equity brought against officers of a State, who, as individuals, have no personal interest in the subject-matter of the suit, and defend only as representing the State, where the relief prayed for, if done, would constitute a performance of the alleged contract of the State, was a suit against the State (page 504), following in this respect *Hagood v. Southern*, *supra*. A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which constituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State.

On the other hand, *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 1 L. ed. 171, determined that an individual in possession of real estate owned by the Government of the United States, which claimed to be its owner, could nevertheless, properly sued by the plaintiff, as owner, to recover possession.

sion, and such suit was not one against the United States, although the individual in possession justified such possession under its authority. See also *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. 770, to the same effect.

"In *Pennoyer v. McConaughy*, 140 U. S. 1, 9, 11 Sup. Ct. 840, 35 L. ed. 631, a suit against land commissioners of the State, was said not to be against the State although the complainants sought to restrain the defendants, officials of the State, from violating, under an unconstitutional act, the complainant's contract with the State, and thereby working irreparable damage to the property rights of the complainants. *Osborn v. United States Bank*, *supra*, was cited, and it was stated: 'But the general doctrine of *Osborn v. Bank of the United States*, that the Circuit Courts of the United States will restrain a State officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.' The same principle is decided in *Scott v. Donald*, 165 U. S. 58, 67, 41 L. ed. 632, 17 Sup. Ct. 265. And see *Missouri, etc., v. Missouri Railroad Commissioners*, 183 U. S. 53 46 L. ed. 78.

"The cases above cited do not include one exactly like this under discussion. They serve to illustrate the principles upon which many cases have been decided. We have not cited all the cases, as we have not thought it necessary. But the injunction asked for in the *Ayres Case*, 123 U. S. (*supra*), was to restrain the State officers from commencing suits under the act of May 12, 1887 (alleged to be unconstitutional), in the name of the State and brought to recover taxes for its use, on the ground that if such suits were commenced they would be a breach of a contract with the State. The injunction was declared illegal because the suit itself could not be entertained as it was one against the State to enforce its alleged contract. It was said, however, that if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487.) It was not stated that the suit of the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

"Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014 (a rate case), was a suit against a railroad commission (created under an act of the State of Texas) and the Attorney General, all of whom were held suable, and that such suit was not one against the State. The commission was enjoined from enforcing the rates it had established under the act, and the Attorney General was enjoined from instituting suits to recover penalties for failing to conform to the rates fixed by the commission under such act. It is true the statute in that case creating the board provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a court of competent jurisdiction in Travis County, Texas, against the commis-

as defendant. This court held that such language permitted a suit in United States Circuit Court for the Western District of Texas, which faced Travis County, but it also held that, irrespective of that contention, the suit was not in effect a suit against the State (although the Attorney General was enjoined), and therefore not prohibited under the amendment.

It was said in the opinion, which was delivered by Mr. Justice Brandeis, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the court was that the question as to the jurisdiction of the Circuit Court was not tenable whether the jurisdiction was rested (page 393), 'upon the provisions of the statute upon the general jurisdiction of the court existing by virtue of the statutes of Congress and the sanction of the Constitution of the United States.' The force of these grounds is effective and both are of equal force. *Union Pacific R. Co. v. Mason City Company*, 199 U. S. 160, 166, 26 Sup. Ct. 19, 41 L. ed. 134.

In *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819 (another case), it was again held that a suit against individuals, for the purpose of preventing them, as officers of the State, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against a State within the meaning of the amendment. At page 518, in answer to the objection that the suit was really against the State, it was said: 'It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment.' The suit was to enjoin the enforcement of a statute of Nebraska because it was alleged to be unconstitutional, on the ground that the rates being too low to afford some compensation to the company, and contrary, therefore, to the Fourteenth Amendment. There was no special provision in the statute as to rates, making it the duty of the Attorney General to enforce it, but under his general powers and authority to ask for mandamus to enforce such or any other law. *Nebraska ex rel. v. The Fremont, etc., Railroad Co.*, 220 U. S. 313.

The final decree enjoined the Attorney General from bringing any suit (page 477) by way of injunction, mandamus, civil action or indictment, for the purpose of enforcing the provisions of the act. The fifth section of the act provided that an action might be brought by a railroad company in the Supreme Court of the State of Nebraska; but this court did not base its decision on that section when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual State officers for the purpose of enjoining them from enforcing, either by civil action or indictment, an unconstitutional enactment to the injury of the plaintiff's right. (Page 518.)

This decision was reaffirmed in *Prout v. Starr*, 188 U. S. 537, 542, 23 Sup. Ct. 398.

Attention is also directed to the case of *Missouri, etc., Ry. Co. v. Missouri, etc., Commissioners*, 183 U. S. 53, 46 L. ed. 78. That was a suit

brought in a State court of Missouri by the railroad commissioners of the State, who had the powers granted them by the statutes set forth in the report. Their suit was against the railroad company to compel it to discontinue certain charges it was making for crossing the Boonville bridge over the Missouri River. The defendant sought to remove the case to the Federal court, which the plaintiffs resisted, and the State court refused to remove on the ground that the real plaintiff was the State of Missouri, and it was proper to go behind the face of the record to determine that fact. In regular manner the case came here, and this court held that the State was not the real party plaintiff, and the case had therefore been properly removed from the State court, whose judgment was thereupon reversed.

"Applying the same principles of construction to the removal act which had been applied to the Eleventh Amendment, it was said by this court that the State might be the real party plaintiff when the relief sought enures to it alone, and in whose favor the judgment or decree, if for the plaintiff, will effectively operate.

"Although the case is one arising under the removal act, and does not involve the Eleventh Amendment, it nevertheless illustrates the question now before us, and reiterates the doctrine that the State is not a party to a suit simply because the State railroad commission is such a party.

"The doctrine of *Smyth v. Ames* is also referred to and reiterated in *Gunter, Attorney General, v. Atlantic, etc., Railroad Co.*, 200 U. S. 273, 283, 26 Sup. Ct. 252, 50 L. ed. 477. See also *McNeill v. Southern Railway*, 202 U. S. 543-559, 50 L. ed. 1142, 26 Sup. Ct. 722; *Mississippi Railroad Commission v. Illinois, etc., Railroad Co.*, 203 U. S. 335, 340, 27 Sup. Ct. 90, 51 L. ed. 209.

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

"It is objected, however, that *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. ed. 535, has somewhat limited this principle, and, that upon the authority of that case, it must be held that the State was a party to the suit in the United States Circuit Court, and the bill should have been dismissed as to the Attorney General on that ground.

"We do not think such contention is well founded. The doctrine of *Smyth v. Ames* was neither overruled nor doubted in the *Fitts* case. In that case the Alabama legislature, by the act of 1895, fixed the tolls to be charged for crossing the bridge. The penalties for disobeying that act, by demanding and receiving higher tolls, were to be collected by the persons paying them. No officer of the State had any official connection with the recovery of such penalties. The indictments mentioned, were found under another statute, set forth at page 520 of the report of the case, which provided a fine against an officer of a company for taking any greater rate of toll than was authorized by its charter, or, if the charter did not specify the

count, then the fine was imposed for charging any unreasonable toll, to be determined by a jury. This act was not claimed to be unconstitutional, and the indictments found under it were not necessarily connected with the alleged unconstitutional act fixing the tolls. As no State officer who was made a party bore any close official connection with the act fixing the tolls, making of such officer a party defendant was a simple effort to test the constitutionality of such act in that way, and there is no principle upon which it could be done. A State superintendent of schools might as well have been made a party. In the light of this fact it was said in the opinion (page 530): 'In the present case, as we have said, neither of the State officers named had any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State a case could be made for the purpose of testing the constitutionality of the statute, by an injunction such as was brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought before any court at the suit of private persons.'

In making an officer of the State a party defendant in a suit to enjoin enforcement of an act alleged to be unconstitutional it is plain that the officer must have some connection with the enforcement of the act, else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, true, the duty of enforcement has been so imposed (154 U. S. 362, 366, 1014, 14 Sup. Ct. 1047, § 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The fact that the State officer by virtue of his office has some connection with enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is immaterial so long as it exists.

In the course of the opinion of the Fitts case the Reagan and Smyth cases were referred to (with others) as instances of State officers specially charged with the execution of a State enactment alleged to be unconstitutional, and who commit under its authority some specific wrong or trespass to the injury of plaintiff's rights. In those cases the only wrong or injury to which trespass involved was the threatened commencement of suits to enforce the statutes as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circum-

stances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer. The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the State.

"The officers in the Fitts case occupied the position of having no duty at all with regard to the act, and could not properly be made parties to the suit for the reason stated.

"It is also objected that as the statute does not specifically make it the duty of the Attorney General (assuming he has that general right) to enforce it, he has under such circumstances a full general discretion whether to attempt its enforcement or not, and the court cannot interfere to control him as Attorney General in the exercise of his discretion.

"In our view there is no interference with his discretion under the facts herein. There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty. *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. ed. 623.

"The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the State officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.

"It is also argued that the only proceeding which the Attorney General could take to enforce the statute so far as his office is concerned, was one by mandamus, which would be commenced by the State in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

"The answer to all this is the same as made in every case where an officer claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a State official in attempting by the use of the name of the State

enforce a legislative enactment which is void because unconstitutional. The act which the State Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and it is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See *In re Ayres*, *supra*, 507. It would be an injury to complainant to harass it with a multiplicity of suits and litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the Federal Constitution be first raised in a Federal court that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts.

The question remains whether the Attorney General had, by the law of the State, so far as concerns these rate acts, any duty with regard to the enforcement of the same. By his official conduct it seems that he regarded it as a duty connected with his office to compel the company to obey the commodity act, for he commenced proceedings to enforce such obedience immediately after the injunction issued, at the risk of being found guilty of contempt by so doing.

The duties of the Attorney General as decided by the Supreme Court of Minnesota, are created partly by statute and exist partly as at common law. See *State ex rel. Young, Attorney General, v. Robinson* (decided June 7, 1907), 112 N. W. Rep. 269. In the above cited case it was held that the Attorney General might institute, conduct and maintain all suits and proceedings he might deem necessary for the enforcement of the laws of the State, the preservation of order and the protection of public rights, and that there were no statutory restrictions in that State limiting the duties of the Attorney General in such case.

Section 3 of chap. 227 of the General Laws of Minnesota, 1905 (same as § 58, Revised Laws of Minnesota, 1905), imposes the duty upon the Attorney General to cause proceedings to be instituted against any corporation whenever it shall have offended against the laws of the State. By § 60 of the Revised Laws of 1905 it is also provided that the Attorney General shall be *ex officio* attorney for the railroad commission and it is made his duty to institute and prosecute all actions which the commission may order brought, and shall render the commissioners all counsel and assistance necessary for the proper performance of their duties.

It is said that the Attorney General is only bound to act when the commission orders action to be brought, and that § 5 of the commodity act (April 18, 1907) expressly provides that no duty shall rest upon the commission to enforce the act, and hence no duty other than that which is discretionary rests upon the Attorney General in that matter. The provision is somewhat unusual, but the reasons for its insertion in that act are not material, and neither require nor justify comment by this court. It would seem to be clear that the Attorney General, under his power

existing at common law and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court."

CHAPTER XI

JURISDICTION OF COURTS OVER CORPORATIONS

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156. Essentials or Prerequisites of Jurisdiction.
 We will state here as preliminary to the discussion of the jurisdiction of courts over corporations that certain general rules as to the essentials of jurisdiction are: (1) The court must have jurisdiction of the class of cases to which the one to be adjudged belongs; (2) the proper parties must be present; and (3) the facts decided must be, in substance and effect, within the

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judgment.¹ So before that power to hear and determine or adjudge a matter in controversy which constitutes jurisdiction² can be affirmed to exist it must be made to appear that the law has given the tribunal capacity to ascertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained.³

**§ 157. Federal Supreme Court—Appeal and Error—
Fundamental Question Is Jurisdiction.**

In the Supreme Court of the United States on every writ of error or appeal the first and fundamental question is that of jurisdiction, first of said court, and then of the court from which the record comes. Such a question arising on the face of the record cannot be ignored. The court is bound to ask and answer this question for itself, without respect to the relation of the parties to it, and whether propounded by counsel or not.⁴

The jurisdiction referred to in the first subdivision of the fifth section of the Judiciary Act of March 3, 1891, is the jurisdiction of the Circuit and District Courts of the United States as such; and when a case comes directly to the Federal Supreme Court under that subdivision, the question of jurisdiction alone is open to examination. The general rule is that the jurisdiction of the Federal Courts depends not on the relative situation

¹ *Railway Co. v. State*, 55 Ark. 200, 205, 17 N. W. 806, per Hemingway, J. (an action to recover penalty from railway company for failure to signal at crossing; jurisdiction of subject and when acquired), citing *Windsor v. McVeigh*, 93 U. S. 274; *Munday v. Vail*, 34 N. J. L. 418; 1 Black on Judg., § 242. See also *Sloan v. Byers*, 37 Mont. 503, 511, 97 Pac. 855, 857, per Smith, J.

² See §§ 80 *et seq.*, herein.

³ *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 157, 82 Am. St. Rep. 68, per Tyson, J., a case relating to jurisdiction over foreign corporations and the nonsufficiency of a levy of attachment to give jurisdiction.

⁴ *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. 63; *Continental Nat. Bk. of Memphis v. Buford*, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. 54; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. ed. 842.

the parties concerned in interest, but on the relative situation of the parties named in the record.⁵

158. Jurisdiction of Federal Supreme Court—Federal Question—Presentment by Record—Special Allegation.

The jurisdiction of the Federal Supreme Court, under § 709 of the Revised Statutes, to review proceedings of State Courts is limited to specific instances of denials of Federal rights specially set up in and denied by the State Court.⁶ The review of judgment of a State Court by said Supreme Court of the United States is confined to assignments of error made and set upon in the judgment brought in said court for review; assignments of error therein cannot bring new matter into record.⁷ Under the Revised Statutes, § 709, there are three classes of cases in which the final decree of a State Court may be examined in the Supreme Court of the United States: (1) where there is drawn in question the validity of a treaty, statute of, or authority exercised under, the United States, and the decision is against their validity; (2) where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; (3) where any title, right, privilege or immunity is claimed under the Constitution, or under a treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and sustained by either party under such Constitution, statute, commission or authority, and in this class the Federal right, title, privilege or immunity must, with possibly some rare exceptions, be specially set up to give said Supreme Court jurisdiction. But where the validity of a treaty or statute of

Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Ct. 211.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. 106 S. W. 918.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. 107; writ of error to review 105 S. W. 851, dismissed.

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the United States is raised, and the decision is against it, or the validity of a State statute is drawn in question, and the decision is in favor of its validity, if the Federal question appears in the record and was decided, or if such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question in said Supreme Court.⁸ Said court does not review, but accepts as conclusive the findings of facts made by the State Court.⁹ So on a writ of error that court cannot deal with facts, and whether the land involved is within or without certain boundaries is for the State Court to determine.¹⁰ And relief cannot be afforded by the United States Supreme Court to one who violates the provisions of a State statute from an erroneous conception of what the statute requires.¹¹

§ 159. Jurisdiction—Appeals Taken After 1891 to Federal Supreme Court.

The Judiciary Act of 1891¹² having provided that no appeals shall be taken from Circuit Courts to the Federal Supreme Court, except as provided in that act, and having repealed all acts and parts of acts relating to appeals or writs of error contained in that act, and the joint resolution of 1891¹³ having provided that nothing contained in that act shall be held to

⁸ *Columbia Water Power Co. v. Columbia Electric St. Ry. L. & P. Co.*, 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. 247, aff'g 43 S. C. 154, 20 S. E. 1002, cited upon the last point in *Bollin v. Nebraska*, 176 U. S. 83, 92, 20 Sup. Ct. 287, 44 L. ed. 382; *Telluride Power Transmission Co. v. Rio Grande Western Ry. Co.*, 175 U. S. 639, 647, 44 L. ed. 305, 20 Sup. Ct. 245; *Scudder v. Comptroller of New York*, 175 U. S. 32, 36, 44 L. ed. 62, 20 Sup. Ct. 26. See also 204 U. S. 568, 196 U. S. 86, 132, 186 U. S. 307, 308, 185 U. S. 46.

⁹ *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. 220, aff'g 106 S. W. 918.

¹⁰ *King v. West Virginia & Spruce Coal & Lumber Co.*, 216 U. S. 92, 54 L. ed. —, 30 Sup. Ct. —, writ of error to review 64 W. Va. 545, 546, 584, 610, dismissed.

¹¹ *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. 370, aff'g 81 Ark. 519.

¹² Act of March 3, 1891, 26 Stat., pp. 826, 827, chap. 517.

¹³ Of March 3, 1891, 26 Stat. 1115.

pair the jurisdiction of said Supreme Court in respect of any case wherein the writ of error or the appeal shall have been entered out or taken to that court before July 1, 1891, an appeal from said court from a judgment entered in a Circuit Court on November 18, 1890, appealable before July 1, 1891, could not be taken after such last-mentioned date.¹⁴

§ 160. Jurisdiction of Federal Circuit Court of Appeals When Invoked—Diverse Citizenship.

The right to invoke the jurisdiction of the Federal Circuit Court of Appeals existed immediately after the act¹⁵ creating said courts, notwithstanding the provision as to appeals taken or pending, before July 1, 1891.¹⁶

The Circuit Courts of Appeals have power to review the judgments of the Circuit Courts in cases where the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship, notwithstanding constitutional questions may have arisen under the jurisdiction of the Circuit Court attached.¹⁷

§ 161. Original Jurisdiction of Federal Circuit Courts under Judiciary Act of 1888.

The Judiciary Act as amended in 1888 provides: § 1. "That the National Exchange Bk. of Baltimore v. Peters, 144 U. S. 570, 36 L. ed. 12 Sup. Ct. 767, cited in Little Rock & M. Rd. Co. v. East Tenn. Va. & Md. Rd. Co., 159 U. S. 698, 699, 40 L. ed. 311, 16 Sup. Ct. 189; Mason v. Fabie Mining Co., 153 U. S. 361, 366, 14 Sup. Ct. 847, 38 L. ed. 745; American Construction Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 378, 13 Sup. Ct. 758, 37 L. ed. 486; United States v. Ady, 76 Fed. 360; Bush & L. R. Corp. v. Boston & L. R. Corp., 51 Fed. 931.

Of March 31, 1891.

So held in Baltimore & Ohio R. Co. v. Andrews (U. S. C. C. A.), 50 Fed. 728, 6 U. S. App. 75, 1 C. C. A. 636, 17 L. R. A. 190. See Northern R. Co. v. Amato (U. S. C. C. A.), 49 Fed. 881, aff'd in 144 U. S. 465, 14 L. ed. 506, 12 Sup. Ct. 740; Louisville Public Warehouse Co. v. Collector of Customs (U. S. C. C. A.), 49 Fed. 561, aff'g 48 Fed. 372.

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 13 Sup. Ct. 646.

Jurisdiction of United States Circuit Court of Appeals limited to appeals from final decree and does not embrace those which involve constitutionality of state law and Federal Constitution. Westerly v. Westerly Waterworks (U. S. C. C. A.), 76 Fed. 467, 22 C. C. A. 278, 33 U. S. App. 723, appeal dismissed, 15 Fed. 181, dismissed.

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the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State, claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder of [if] such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.”¹⁸

¹⁸ Act of August 13, 1888, chap. 866, § 1, 25 Stat. at L. 433, U. S. Comp.

§ 162. **Equity Jurisdiction—Generally.**

The equity jurisdiction of the Federal Courts is derived from the Federal Constitution and is like unto that of the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789.¹⁹ A court of equity has jurisdiction of a bill by a corporation praying that its guaranty on a great number of negotiable bonds may be canceled, and suits upon it restrained, because of facts not appearing on its face.²⁰ But equity courts do not restore money or property to corporations that have obtained them by contracts or conveyances made in excess of their powers, until those corporations first restore the money or property they have secured thereby or its value, since he who seeks equity must first do equity.²¹

Stat. 1901, p. 508, amending act of March 3, 1887, chap. 373, § 1, 24 Stat. at L. 552, amending the first section of "an act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from state courts and for other purposes." Approved March 3, 1875, chap. 137, § 1, 18 Stat. at L. 470. See Act of March 3, chap. 517, §§ 4-6, U. S. Comp. Stat., 1901, pp. 548-550, as to appellate jurisdiction superseding such jurisdiction of Circuit Courts. See § 629, Rev. Stat., pars. 1-20, superseded by act of 1875.

When a State contains more than one district, every suit not of a local nature in the Circuit or District Court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district, and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State. Act of May 4, 1858, chap. 27, 11 Stat. L. 272, Rev. Stat., § 740; Act of February 24, 1863, chap. 54, § 9, 12 Stat. L. 662, U. S. Comp. Stat., 1901, p. 588.

In what district suits for infringement of patents to be brought. Act of March 3, 1897, chap. 395, 29 Stat. 695, U. S. Comp. Stat., 1901, p. 589.

¹⁹ *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 54 L. ed. —, 30 Sup. Ct. —.

²⁰ *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. 821.

²¹ *Jenson v. Toltec Ranch Co.* (U. S. C. C. A.), 174 Fed. 86, citing *Logan County Bank v. Townsend*, 139 U. S. 67, 72, 77, 78, 11 Sup. Ct. 496, 35 L.

§ 163. Equity Jurisdiction—Adequate Remedy at Law.

The National courts have jurisdiction in equity in the absence of an adequate remedy at law in those courts. The test of their equitable jurisdiction is the absence of such remedy in the Federal Courts. The presence or absence of a remedy at law in the State Courts is not the test of the jurisdiction in equity of the Federal Courts. The equitable jurisdiction of the Federal Courts vested in them under the Judiciary Act of 1789, and, where it has not been subsequently changed by act of Congress, the test of that jurisdiction is the adequacy of the remedy at law for wrongs of the character under consideration in the year 1789, when the Judiciary Act was adopted.²² So

ed. 107; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. ed. 55; *Pullman's Car Co. v. Transportation Co.*, 171 U. S. 138, 150, 151, 18 Sup. Ct. 808, 43 L. ed. 108; *Planters' Bank v. Union Bank*, 16 Wall. (83 U. S.) 483, 21 L. ed. 473; *Hovey's Estate, In re*, 198 Pa. St. 385, 48 Atl. 311, 315; *Dunlop v. Mercer*, 156 Fed. 545, 553, 86 C. C. A. 435, 443.

²² Syllabus in *National Surety Co. v. State Bank*, 120 Fed. 593.

When equity has jurisdiction—remedy at law inadequate, see the following cases:

United States: *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. 118, 4 Bkg. L. J. 175; *Kilbourne v. Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 17 Wash. L. Rep. 278, 9 Sup. Ct. 594; *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & I. Co.* (U. S. C. C.), 96 Fed. 34; *National Bank of Commerce v. Allen* (U. S. C. C.), 90 Fed. 545, 2 Denver Leg. Adv. 240, 33 C. C. A. 169, 61 U. S. App. 102, 9 Am. & Eng. Corp. Cas. (N. S.) 429; *Southern R. Co. v. North Carolina R. Co.* (U. S. C. C.), 81 Fed. 595; *Pittsburg, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* (U. S. C. C.), 68 Fed. 19; *Gunn v. Brinkley Car Works & Mfg. Co.* (U. S. C. C.), 13 C. C. A. 529, 66 Fed. 382; *North British & M. Ins. Co. v. Lathrop* (C. C. E. D. Va.), 63 Fed. 508.

Alabama: *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514.

Illinois: *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

Maine: *Porter v. Frenchman's Bay & Mt. D. & Land & W. Co.*, 84 Me. 195, 54 Atl. 814.

New York: *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552, 65 N. Y. St. R. 506, 40 N. E. 206, 27 L. R. A. 757, rev'g 81 Hun, 56, 62 N. Y. St. R. 249, 9 Nat. Corp. Rep. 383, 30 N. Y. Supp. 482.

Pennsylvania: *Conemaugh Gas Co. v. Jackson Farm Gas Co.*, 186 Pa. 443, 29 Pitts. L. J. (N. S.) 136, 40 Atl. 1000; *Boyd v. American Carbon Black Co.*, 182 Pa. 206, 37 Atl. 937, 40 W. N. C. 459.

When equity will not take jurisdiction—remedy at law adequate, see the following cases:

it is held in another case that the adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue in a State Court on the same cause of action.²³

Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law, and where, so far as necessary, discovery may be obtained as well as in equity.²⁴

United States: Washington Market Co. v. District of Columbia, 172 U. S. 361, 43 L. ed. 478, 19 Sup. Ct. 218, aff'g 6 App. D. C. 34, 23 Wash. L. Rep. 213; Smyth v. New Orleans Canal & Bkg. Co., 141 U. S. 656, 35 L. ed. 891, 12 Sup. Ct. 113; Safe Deposit & Trust Co. of Baltimore v. City of Anniston (U. S. C. C.), 96 Fed. 661; Sigua Iron Co. v. Clark (U. S. C. C.), 77 Fed. 496; National Park Bank v. Peavey (U. S. C. C.), 64 Fed. 912; International Trust Co. v. Cartersville Improvement G. & W. Co. (U. S. C. C.), 63 Fed. 341; United States Bank v. Lyon County (U. S. C. C.), 46 Fed. 514; American Cable R. Co. v. Citizens' R. Co. (U. S. C. C.), 44 Fed. 484; Manchester F. Assur. Co. v. Stockton Combined Harvester & Agri. Works (U. S. C. C.), 38 Fed. 378.

Alabama: Farmers' & M. Bank v. Hall, 120 Ala. 14, 24 So. 347.

Arkansas: Davis v. Arkansas F. Ins. Co., 63 Ark. 412, 39 S. W. 258.

California: Myers v. Sierra Valley S. & A. Assoc., 122 Cal. 669, 55 Pac. 689.

New Hampshire: Boston, C. & M. R. Co. v. Boston & L. R. Co., 65 N. H. 393, 23 Atl. 529.

Pennsylvania: Salisbury Gas Co. v. Salisbury, 138 Pa. 250, 21 Pitts. L. J. (N. S.) 148, 48 Phila. Leg. Int. 149, 27 W. N. C. 120, 20 Atl. 844, 10 L. R. A. 193; Sanderson v. Whitmeyer (C. P.), 2 Dauph. Co. Rep. 174, 8 Pa. Dist. Rep. 312.

West Virginia: Thompson v. Whittaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

²³ Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. 418, 30 Chicago Leg. News, 243, 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 497.

²⁴ Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. 404; rev'g 151 Fed. 1; United States v. Bitter Root Co., 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. 318, Rev. Stat., § 724.

See the following cases: Smyth v. New Orleans Canal & Bkg. Co., 141

§ 164. Equity Jurisdiction—Adequate Remedy at Law—Collection of Taxes—Injunction.

Where a corporation has paid the full amount of its tax as based upon the same rate as that levied upon other property of the same class, equity will restrain the collection of the excess illegally assessed, there being no adequate remedy at law, when it appears that it would require a multiplicity of suits against the various taxing authorities to recover the tax and that a portion of it would go to the State against which no action would lie, and where the amount is so great that its payment would cause insolvency, and a levy upon the property of a street car system, and embarrass and injure the public.²⁵ But the collection of taxes under authority of a State will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction.²⁶

In a comparatively recent case in the United States Supreme Court it appeared that a bill in equity had been brought by a West Virginia corporation against a city in Idaho, in the Federal Circuit Court for the District of Idaho, to obtain an injunction against the enforcement of an ordinance, and the following points were decided: (1) Equity will not interpose where there is a remedy at law which is as complete, practicable and adequate as equity could afford. (2) As the defense of the unconstitutionality and illegality of a tax is open in a court of law, injunction should not issue against the enforcement of the tax merely because it is unconstitutional or illegal unless

U. S. 656, 35 L. ed. 891, 12 Sup. Ct. 113; *Smith v. American Nat. Bank*, 89 Fed. 832, 60 U. S. App. 431, 32 C. C. A. 368; *Western Assur. Co. v. Ward*, 75 Fed. 338, 41 U. S. App. 443; *Moffett H. & C. Co. v. Rochester* (U. S. C. C.), 4 Det. L. News, 22, 30 Chicago Leg. News, 11, 82 Fed. 255; *Darrah v. Boyce*, 62 Mich. 480, 29 N. W. 102.

²⁵ *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. ed. 7.

²⁶ *Arkansas Building & Loan Ass'n v. Madden*, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. 119.

other circumstances bring the case within some clear ground of equity jurisdiction. (3) Even though some States may for convenience of remedy permit equity to enjoin the collection of a tax for mere illegality, courts of a different and paramount sovereignty should not do so, and Federal Courts should not interfere by injunction with the fiscal arrangements of a State if the rights involved can be preserved in any other manner. (4) A municipality speaks through its council, and where the bill does not allege any facts showing threats to remove property of a complainant public service corporation such action will not be presumed so as to give equity jurisdiction. (5) A suit at law by a municipality to collect a license fee imposed by ordinance on a public service corporation contemplates continuance and not restraint, of the business of such corporation, and, as the defense of unconstitutionality of the ordinance is open in that suit, equity should not interfere. (6) Equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected by a suit at law in which the defense of its illegality is open, and it does not appear that the tax is a lien on any of complainant's property.²⁷

§ 165. Equity Jurisdiction—Waiver of Defense of Remedy at Law.

The defense in an equity suit that the complainant has not exhausted his remedy at law may be waived by defendant, and when waived, as it may be by consenting to the appointment of receivers, the case stands as though the objection never existed.²⁸

§ 166. Equity Jurisdiction of Federal Courts—Parties.

While a Federal court of equity cannot, either under the forty-seventh rule in equity or general principles of equity, proceed to adjudication in the absence of indispensable parties,

²⁷ *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. 426.

²⁸ *Metropolitan Railway Receivership, In re*, 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. 219.

if it can do justice to the parties before it without injury to absent persons it will do so and shape the decree so as to preserve the rights of those actually before the court, without prejudice to the rights of the absentees.²⁹ The general rule in

²⁹ *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 54 L. ed. —, 30 Sup. Ct. —. In this case the absent party was not of the same State as complainant and had no interest in common with complainant and while a proper, was not an indispensable party, as his interests were separate and could be protected by retention of his legacy by the executors subject to adjudication in another suit. The court, per Mr. Justice Day, said: "Section 737 of the Revised Statutes of the United States provides: 'When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer.'"

"To the same effect is the forty-seventh equity rule. This statute and rule permit the court to proceed with the trial and adjudication of the suit, as between parties who are properly before it, and preserves the rights of parties not voluntarily appearing, providing their rights are not prejudiced by the decree to be rendered in the case. This rule has been said to be declaratory of the already-established equity practice. *Shields v. Barrow*, 17 How. (58 U. S.) 130, 15 L. ed. 158; 1 *Street's Federal Equity Practice*, § 533, and cases there cited. This rule does not permit a Federal Court to proceed to a decree in that class of cases in which there is an absence of indispensable, as distinguished from proper, or even necessary parties, for neither the absence of formal, or such as are commonly termed necessary parties, will defeat the jurisdiction of the court; provided, in the case of necessary parties, their interests are such and so far separable from those of parties before the court, that the decree can be so shaped that the rights of those actually before the court may be determined without necessarily affecting other persons not within the jurisdiction. After pointing out that there may be formal parties, of whose omission the court takes no account, Mr. Justice Miller, in delivering the opinion in *Barney v. Baltimore*, 6 Wall. (73 U. S.) 280, went on to say:

"There is another class of persons whose relations to the suit are such that if their interests and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses

equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it; and the established practice of courts of equity is to dismiss the plaintiff's bill if it appears that the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel. So when it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties; and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend.³⁰

to entertain the suit when these parties cannot be subjected to its jurisdiction.'

"The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party. 1 Street's Fed. Equity Practice, § 519.

"If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties without prejudice to such absent persons. *Payne v. Hook*, 7 Wall. (74 U. S.) 425, 19 L. ed. 260." The principal case was a question of jurisdiction concerning the right of the Federal Circuit Court to entertain a bill in equity brought by residents and citizens of Illinois against a bank and trust company, a citizen and inhabitant of Louisiana, and also certain institutions, inhabitants of said State and established under its laws also against other citizens and inhabitants, natural persons, of said State; also against a natural person residing in a State outside the court's jurisdiction.

³⁰ *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. ed. 299. The bill disclosed in this case that the parties to be affected by the decision of the controversy were, directly, the State of Minnesota, the Great Northern Railway Company, and the Northern Pacific Railway Company, corporations of that State, and the Northern Securities Company, a corporation of the State of New Jersey; and, indirectly, the stockholders and bondholders of those corporations, and of the numerous railway companies whose lines were alleged to be owned, managed or controlled by the

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§ 167. Equity Jurisdiction to Remove Cloud Upon, or to Quiet Title.

Equity has jurisdiction to remove a cloud from and quiet title to real estate, and any deed, devise, or other instrument, judgment or decree, not void on its face, which purports to convey any interest in or makes any charge upon land of the true owner, the invalidity of which requires proof by extrinsic evidence, is a cloud upon the legal title of the owner in possession; so, any pretended conveyance which, if left undisturbed may ripen into a perfect title, must necessarily create a cloud upon the true title, under the laws of West Virginia, and a suit may be maintained in a Federal Court there for the cancellation of such instrument and this applies to deeds executed to each other and caused to be recorded by members of an organization in furtherance of an alleged fraudulent conspiracy, and defendants only possession is alleged to be that of tenants of the complainant who is absolute owner of the land.³¹ A bill in equity in Indiana which avers that a deed is void on its face, and an answer which does not deny the averment, will support the jurisdiction of the Federal Circuit Court in that district to quiet the title of complainant as against the deed.³² So a bill which charges that the collection of an illegal tax would involve the plaintiff in a multiplicity of suits as to the title of lots being laid out and sold, which would prevent their

Great Northern and Northern Pacific Railway Companies; and it was obvious that the rights of the minority stockholders of the two railroad companies were not represented by the Northern Securities Company.

³¹ *Acord v. Western Pocahontas Corporation* (U. S. C. C.), 156 Fed. 989, citing *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 383; *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603 (syl. 21); 102 Am. St. R. 959; *Robinson v. Lowe*, 50 W. Va. 75, 40 S. E. 454; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *Ambler v. Leach*, 15 W. Va. 677; *Garrett v. Ramsay*, 26 W. Va. 345; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682.

Where land or other subject-matter of a fixed character lies in different districts of same State. Act May 4, 1858, chap. 27, § 2, 11 Stat. at L. 27, § 742, Rev. Stat. U. S. Comp. Stat. 1901, p. 588. See act March 3, 1875, chap. 137, § 8.

³² *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. ed. 733, aff'g *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. 495.

sale, and which would cloud the title to all its real estate, states a case for relief in equity.³³ Where the attitude and claims of a municipality cast a cloud upon the title to property consisting largely of franchises in the hands of receivers and to be administered under orders of the court, the receivers may, with the authority of the court, proceed by ancillary bill to protect the jurisdiction and right to administer the property, and to determine the validity of claims of parties which cast a cloud upon such franchises, and in such case it is proper to grant an injunction until the rights of parties can be determined.³⁴ Although a State statute may have enlarged the ordinary equitable action to quiet title and remove a cloud, the Federal Circuit Court sitting in that district may take jurisdiction of a bill properly brought under its provisions.³⁵

§ 168. Jurisdiction of Federal Circuit Court to Remove Incumbrance or Lien or Cloud Upon Title to Property Within District—Absent Defendants—Process—Service—Publication.

The repealing section of the Judiciary Act of 1887-1888, did not reach § 8 of the act of 1875,³⁶ and that section is still in

³³ *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. 601.

³⁴ *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801, rev'g 132 Fed. 848.

³⁵ *Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. 650.

³⁶ Act of March 3, 1875, § 8, chap. 137, 18 Stat. 470, 472, U. S. Comp. Stat., p. 513. By this section determining the jurisdiction of the Circuit Courts of the United States, it was provided: "That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not

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Congress of 1875³⁸ which authorized proceedings by publication against absent defendants in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought; and that for the purposes of said act the stock held by the citizens of Massachusetts was to be deemed personal property "within the district" where the suit was brought. The certificates of stock were only evidence of the ownership of the shares, and the interest represented by the shares was held by the company for the benefit of the true owner. And as the habitation or domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner.³⁹ Again, a suit instituted by a creditor of a corporation, on his own behalf and on behalf of other unsecured creditors, to set aside a conveyance of its real estate and a mortgage of its personal property, both made by the corporation in trust to secure certain preferred creditors, including among them a director of the corporation, and also to procure a dissolution of the corporation, and the closing up of its business, is a suit brought to remove an incumbrance or lien or cloud upon the title to such property within the meaning of the act of Congress of 1875, authorizing a Circuit Court of the United States to summon in an absent defendant and to exercise jurisdiction over his rights in the property in suit within the jurisdiction of the court; nor is it necessary that the creditor of an insolvent corporation should obtain judgment on his claim, and take out execution and exhaust his remedies at law, in order to invoke the jurisdiction of a court of equity in his favor to remove an incumbrance or cloud or lien upon the title of the corporation's property under said statute.⁴⁰

³⁸ Act of March 3, 1875, 18 Stat. 470, chap. 137, § 8, given in note above.

³⁹ *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. ed. 647.

⁴⁰ *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 33 L. ed. 178, 290

**§ 169. Equity Jurisdiction of Federal Circuit Courts—
Probate Matters—Diverse Citizenship.**

While Federal Courts cannot seize and control property which is in the possession of the State Courts and have no jurisdiction of a purely probate character, they can, as Courts of Chancery, exercise jurisdiction where proper diversity of citizenship exists, in favor of creditors, legatees and heirs, to establish their claims and have a proper execution of the trust as to them. And although a complainant asks in some of the prayers for relief which is beyond the jurisdiction of the court as being of a purely probate character, if the allegations of the bill support them the court may grant other prayers for relief which are within its jurisdiction, and, as a court of equity, shape its decree according to the equity of the case. Again, where the bill does not seek to set aside the probate of a will or interfere with the possession of the Probate Court, the Federal Court of Equity, in a case where diverse citizenship exists, may determine as between the parties before the court their interest in the estate, and such decree will be binding upon, and may be enforced against, the executor. It will be assumed that the State Probate Court will respect the decree of the Federal Court having jurisdiction settling the rights of parties in an estate, and the denial of effect of such decree presents a claim of Federal right which can be protected by the Federal Supreme Court.⁴¹

**§ 170. When Equity Has no Jurisdiction of Bill to
Recover Lands of Railroad Company.**

A court of equity has no jurisdiction of a bill to recover lands held as property of a railroad company under a foreclosure 9 Sup. Ct. 781; act of March 3, 1875, § 8, 18 Stat. 470, 472, chap. 137, U. S. Comp. Stat. 513.

⁴¹ *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 54 L. ed. —, 30 Sup. Ct. —. This case was one of a bill in equity brought in the United States Circuit Court by residents and citizens of Illinois against the Canal-Louisiana Bank & Trust Company, executor, and certain corporations and institutions established under the laws of another State and citizens thereof and inhabitants of the district therein in which the suit was brought; also against certain natural persons.

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sale of corporate property, where such suit is in effect one to determine the legal title to the lands and is brought by one holding the legal title to the stock of the corporation, although based upon the claim that he was acting as trustee of pledgees, from whom he held by assignment, with but an equitable title in part of the stock upon which he was suing; that he was attempting to recover property of a dissolved corporation; and that the lands did not pass by the sale and were still liable for the debts of the stock. An assignee of the pledgee of stock of a dissolved corporation has no greater rights in bringing suits than could his assignor or the pledgee have had, and the latter can have no greater rights than his assignor. And where the complainant's interest instead of being equitable, as alleged, has become legal by an assignment and conveyance, the equitable features disappear and, whatever equities might be urged between the complainant and his *cestuis qui trustent*, there is between him and defendant, in such case, but the enforcement of a legal title. Again, the principle upon which courts of equity take jurisdiction in cases where it is sought to follow the property of dissolved corporations in behalf of creditors thereof, is that such property, when held by a legal title, is charged with an implied trust to pay the indebtedness, but this does not apply where it cannot be claimed that property is so charged.⁴²

§ 171. Jurisdiction of Court of Claims of New York—Negligence Causing Death—Nonresidents as Parties—State as Common Carrier.

It was the intention of the legislature of the State of New York as expressed in the Code of Civil Procedure⁴³ that the Court of Claims should have jurisdiction in those cases where death is caused by a wrongful act, neglect or default on the part of the State; and the right given to prosecute a private claim against the State in the Court of Claims to recover dam-

⁴² *Knevals v. Florida Central & Peninsula Rd. Co.* (U. S. C. C. A.), 66 Fed. 224, 13 C. C. A. 410. Petition for certiorari denied (mem.), 159 U. S. 257.

⁴³ See § 264.

ages for a wrongful act, neglect or default on the part of the State, by which the death of any person has been caused is not confined to residents of the State, but such a claim may be prosecuted by a resident of another State. The State of New York having acquired, pursuant to law, for a State reservation, lands at Niagara Falls, upon which was an inclined railroad, had the power to continue the operation of such railroad so as to derive a revenue therefrom; but the doctrine of *ultra vires* as applied to corporations is not applicable to the State itself when it does not exceed the constitutional limits of its powers. Such doctrine cannot, however, be invoked to shield a corporation from the consequences of its negligence in conducting a business not within the scope of its lawful activities. Again, when a State engages in the business of a common carrier, it must maintain and operate a suitably and properly equipped road. It must take care to prevent accidents, to see that its machinery and appliances are reasonably safe for the purposes for which they are used and to introduce and use such improvements in its machinery and apparatus as have been found naturally to contribute to safety, in the same manner as other common carriers of passengers for hire.⁴⁴

⁴⁴ *Burke v. State of New York*, 64 Misc. 558.

JURISDICTION OF COURTS

CHAPTER XII

JURISDICTION OF COURTS OVER CORPORATIONS CONTINUED

- § 172. What Constitutes Controversy or Dispute Between Parties — Jurisdiction of Federal Circuit Court — Citizenship.
- 173. When Corporation Is and Is Not a Citizen — Pleadings.
- 174. Presumption as to Citizenship of Members of Corporation — President and Stockholders.
- 175. Citizenship — Joint Stock Company Not a Corporation for Jurisdictional Purposes.
- 176. Citizenship — Limited Partnership Not a Corporation for Jurisdictional Purposes.
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| <p>§ 194. Motive for Bringing Suit or .n
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§ 172. What Constitutes Controversy or Dispute Between Parties—Jurisdiction of Federal Circuit Court—Citizenship.

An unsatisfied, justiciable claim of some right involving the jurisdictional amount made by a citizen of one State against a citizen of another State is a controversy or dispute between the parties within the meaning of the statutes defining the jurisdiction of the Circuit Court.¹ And such jurisdiction does not depend upon the denial by the defendant of the existence of the claim or of its amount or validity.²

In the exercise of the jurisdiction conferred upon it of controversies between citizens of different States a Circuit Court of the United States is for every practical purpose a court of the State in which it sits and will enforce the rights of parties according to the law of that State, taking care, as a State Court must, not to infringe any right secured by the Constitution and the laws of the United States. And in case of condemnation it would proceed under the sanction of and enforce the State law so far as it was not unconstitutional.³

§ 173. When Corporation Is and Is Not a Citizen—Pleadings.

Although a corporation, being an artificial body created by legislative power, is not a citizen within several provisions of the Constitution, yet where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the State where it was created, within the clause extending the judicial power of the United States to controversies be-

¹ Acts of March 3, 1875, chap. 137, § 1, 18 Stat. 470; March 3, 1887, chap. 373, § 1, 24 Stat. 552; August 13, 1888, chap. 866, § 1, 25 Stat. 433.

² Metropolitan Railway Receivership, In re, 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. 219.

³ Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 262.

tween citizens of the different States. And where a corporation is created by the laws of a State, it is, in suits brought in a Federal Court in that State, to be considered as a citizen of such State, whatever its status or citizenship may be elsewhere by the legislation of other States.⁴ It was held in 1861, by the Federal Supreme Court, that a corporation is not a citizen within the meaning of the Constitution of the United States and cannot maintain a suit in a court of the United States against the citizen of a different State from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that State; that, in such case they may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as the joint suit of individual persons, united together in the corporate body and acting under the name conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the Federal Courts against a citizen of another State.⁵ Where there is no plea to the jurisdiction in a suit in equity in a Federal Court an allegation that complainant is a corporation and citizen of a certain State, and that defendants are citizens of another State, and residents of the district where the suit was brought, stands admitted as to complainant though denied in the answer and as to the defendants by failure to deny.⁶

⁴ *Railway Co. v. Whitton*, 13 Wall. (80 U. S.) 270, 20 L. ed. 571.

⁵ *Ohio & Mississippi Rd. Co. v. Wheeler*, 1 Black. (66 U. S.) 286, 17 L. ed. 130.

⁶ *Crown Cork & Seal Co. v. Standard Brewery* (U. S. C. C.), 174 Fed. 252, citing *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. ed. 579; *Butchers' & Drovers' Stock Yards Co. v. Louisville & Nashville R. Co.*, 67 Fed. 35, 14 C. C. A. 290, 31 U. S. App. 252.

Pleadings—as to averments of citizenship, see the following cases: *Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. 859; *Gordon v. Third Nat. Bank of Chattanooga*, 144 U. S. 97, 36 L. ed. 360, 12 Sup. Ct. 657; *Everhart v. Huntsville College*, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. 555; *Continental Ins. Co. v. Rhodes*, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. 193; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. 207; *Covington Drawbridge Co. v. Shepherd*, 20 How. (61 U. S.) 227, 15 L. ed. 896, aff'd 21 How. (62 U. S.) 112, 16 L. ed. 38; *Piquignot v. Pennsylvania Railroad Co.*, 16 How. (57 U. S.) 104, 14 L. ed. 863.

General issue admits corporate capacity of plaintiffs to sue. *Society for*

§ 174. Presumption as to Citizenship of Members of Corporation—President and Stockholders.

For the purpose of suing and being sued in the Circuit Court of the United States the members of a local corporation are conclusively presumed to be citizens of the State by whose law it was created and in which alone the corporate body has a legal existence.⁷ There is an indisputable legal presumption that a State corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and, therefore, such corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal Courts in "controversies between citizens of different States." This presumption accompanies a railroad corporation, which has consent to extend its railroad into another State, and does business therein, and it may sue or be sued in the Federal Courts in such other State as a citizen of the State of its original creation. That presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary.⁸ No

the Propagation of the Gospel, etc., v. Town of Pawlet, 4 Pet. (29 U. S.) 480, 7 L. ed. 927, cited in *New York Dry Dock v. Hicks*, 5 McLean (U. S. C. C.) 111, 115.

Averment of residence of plaintiff in State, in suit against foreign corporation, as basis of order for service by publication, under New York Code (Civ. Proc., § 1780, and § 438. See *Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft* (U. S. C. C.), 173 Fed. 624.

An averment in a bill that the complainants are "all of Cognac in France, and citizens of the Republic of France," is sufficient to give the Circuit Court of the United States for Nebraska jurisdiction in a controversy where the defendants are citizens of Nebraska. No averment of alienage is necessary. *Hennessy v. Richardson Drug Co.*, 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. 532.

⁷ *Thomas v. Board of Trustees of the Ohio State University*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160.

⁸ *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. 621, reviewing the authorities, and cited in *Utah-Nevada Co. v. De Lamar*, 113 Fed. 113, 118, 66 C. C. A. 179, distinguished in *Patch v. Wabash Rd. Co.*, 207 U. S. 277, 28 Sup. Ct. 80, 52 L. ed. 208. See *Dodd v. Louisville Bridge Co.* (U. S. C. C.), 130 Fed. 186, 196.

Where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence. And a suit by or against a corporation, in

presumption exists, however, that a president or stockholder of a corporation is a citizen of the same State as the corporation when an individual's citizenship is in question upon his right to sue in the Federal Courts. But a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the State which created the corporate body, and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the United States. This rule of the Supreme Court was made to prevent the interminable litigation that might arise if every corporation, when suing or being sued in the courts, was compelled to show that each and every one of its members was a citizen of the State in which the corporation was organized. The necessity of the rule, the object in adopting it, was to fix the status of the corporations, and determine their rights in suing or being sued. For that purpose the presumption is indulged in. The constant tendency of the decisions of the Supreme Court of the United States has been towards putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them.⁹

§ 175. Citizenship—Joint-Stock Company Not a Corporation for Jurisdictional Purposes.

An allegation that a plaintiff is a joint-stock company organized under the laws of a State is not an allegation that it is its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. *Ohio & Mississippi Rd. Co. v. Wheeler*, 1 Black. (66 U. S.) 286, 17 L. ed. 130.

While the members of a corporation are, for purposes of suit by or against it in the courts of the United States, to be conclusively presumed to be citizens of the State creating it, the corporation itself is not a citizen within the meaning of the provision of the Constitution that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States. *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. 165.

⁹ *Utah-Nevada Co. v. De Lamar*, 133 Fed. 113, 118, 66 C. C. A. 179. See *Dodd v. Louisville Bridge Co.* (U. S. C. C.), 130 Fed. 186, 196.

a corporation, but, on the contrary, that it is not a corporation but a partnership. And an averment that a joint-stock company is a citizen of a State different from that of the defendant will not give the Supreme Court jurisdiction on the ground of citizenship.¹⁰ It is pertinent, however, in this connection to state that under several State Constitutions and certain State statutes the term "corporations" includes associations and joint-stock companies.¹¹ And it is determined by the Federal Supreme Court that while that court is not conclusively bound by the judgment of the highest court of a State as to what is and is not a corporation of that State within the jurisdictional rule, it will accept such judgment unless a contrary view is demanded by the most cogent reasons.¹²

§ 176. Citizenship—Limited Partnership Not a Corporation for Jurisdictional Purposes.

A limited partnership, doing business under a firm name, and organized under a State statute entitled "an act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances" is not a corporation within the rule that a suit by or against a corporation in a court of the United States is conclusively pre-

¹⁰ *Chapman v. Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. 426, cited in *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 586; *Gregg v. Sanford*, 65 Fed. 153. Examine *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 577 U. S.) 566, 574, 19 L. ed. 1029, aff'g *Oliver v. Liverpool & London Life & Fire Ins. Co.*, 100 Mass. 531, Mr. Justice Bradley dissenting. *Tide Water Pipe Co., Limited, v. State Board of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684, 31 Atl. 221; *Fargo v. McVicker*, 55 Barb. (N. Y.) 437.

¹¹ See *Joyce on Franchises*, § 52. See also *Id.*, §§ 52-54, for discussion of question as to what extent the definition of a corporation includes a company, association and joint-stock association or company and partnership. Examine *Public Service Commissions Law of New York*, Laws 1907, p. 891, chap. 429, art. I, § 2; *Joint-Stock Assoc. Law*, N. Y. Laws 1894, chap. 235, § 2.

¹² *Thomas v. Board of Trustees of the Ohio State University*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160. In this case, as we have stated in the text where we have considered this case it was decided by the highest State Court that a board of trustees of a State institution was not a corporation although possessing some of the attributes of a corporation.

sumed, for the purposes of the litigation to be one by or against citizens of the State creating the corporation. It is not sufficient that the association may be described as a quasi-corporation or as a "new artificial person." The rule does not embrace a new artificial person that is not a corporation.¹³

§ 177. Citizenship—Board of Trustees Not a Corporation for Jurisdictional Purposes.

An averment that a Board of Trustees of a State institution was created by and exists under the laws of a State, other than that of complainant, and is a citizen of that State, without alleging that it is a corporation of the State, or that each individual member of the Board is a citizen of that State, and the highest court of the State has decided that the Board although possessing some of the attributes of a corporation is not a corporation of such State, is held insufficient to sustain the jurisdiction of the Circuit Court on the ground of diverse citizenship. But where a Board of Trustees of an institution can, by the legislative act creating it, sue and be sued collectively and is bound by the judgment, a citizen of another State can sue it as such Board collectively, without bringing in all the members thereof, in a Federal Circuit Court, provided it affirmatively appears that each member of the Board is a citizen of a State other than that of complainant.¹⁴

§ 178. Citizenship of Corporation of Two or More States—Ancillary or Permissive Charters or License.

It was early decided that a corporation endowed with the capacities and faculties it possesses by the co-operating legislation of two States, cannot have one and the same legal being in both States. Neither State could confer on it a corporate ex-

¹³ *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. ed. 842. See *Fred Macey Co. v. Macey*, 135 Fed. 727; *Imperial Refining Co. v. Wyman*, 38 Fed. 574, 3 L. R. A. 504.

¹⁴ *Thomas v. Board of Trustees of the Ohio State University*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160. See *Fred Macey Co. v. Macey*, 135 Fed. 727; *Rees v. Olmstead*, 135 Fed. 301. Compare *Board of Levee Inspectors of Chicot County v. Crittenden*, 94 Fed. 613, 616.

istence in the other, nor add to or diminish the powers to be there exercised. The two corporations deriving their powers from distinct sovereignties, and exercising them within distinct limits, cannot unite as plaintiffs in a suit in a court of the United States against a citizen of either of the States which chartered them.¹⁵ It is competent, however, for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State; and such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States. Such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations. But a provision in a State statute that a railroad corporation of another State which had leased or purchased a railroad in the first State and filed with its Secretary of State, as provided by the act, a certified copy of its articles of incorporation, should become a corporation of the State enacting the statute, does not avail to create a corporation of such statutory State out of a foreign corporation complying with those provisions, in such a sense as to make it a citizen thereof within the meaning of the Federal Constitution, and subject it to a suit in the Federal Courts sitting therein, brought by a citizen of the State of its origin.¹⁶ So although a State statute provides that a foreign railroad company desiring to own property or carry on business, or exercise any corporate franchise within the State, must comply with certain specified provisions of the statute, and on complying therewith shall become a domestic corporation,

¹⁵ *Ohio & Mississippi Rd. Co. v. Wheeler*, 1 Black (66 U. S.), 286, 17 L. ed. 130.

¹⁶ *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545, 40 L. ed. 92, 16 Sup. Ct. 621.

such fact does not affect the character of the original corporation, and it does not thereby become a citizen of such State so far as to affect the jurisdiction of the Federal Courts upon a question of diverse citizenship. And where a corporation which has complied with such statutory provision is sued in the courts of the State enacting the statute, an order of removal made by the Federal Circuit Court operates to withdraw from the State Court the right to hear and determine the case.¹⁷

¹⁷*Southern Ry. Co. v. Allison*, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. ed. 1078, distinguished in *Patch v. Wabash Rd. Co.*, 207 U. S. 277, 284, 52 L. ed. 208, 28 Sup. Ct. 80, cited in *Sun Printing & Publishing Ass'n v. Edwards*, 194 U. S. 377, 381, 48 L. ed. 1027, 24 Sup. Ct. 696 (this case holds that an allegation in the complaint, which is admitted by answer, that defendant is a domestic corporation duly organized and existing under the laws of a designated State and having its principal office therein is a sufficient averment as to defendant's citizenship); *St. Louis & San Francisco R. Co. v. Cross* (U. S. C. C.), 171 Fed. 480, 484 (that by compliance with State law a corporation "may be made what is termed a domestic corporation or in form a domestic corporation, but that it does not thereby become a citizen of the State 'so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship'").

Explained in *Atlantic Coast Line R. Co. v. Dunning* (U. S. C. C. A.), 166 Fed. 850, 857, cited in same case at p. 856.

Cited and quoted from in *Lee v. Atlantic Coast Line R. Co.* (U. S. C. C.), 150 Fed. 775, 795, 796, 797.

Cited in *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* (U. S. C. C.), 139 Fed. 271 (in case where neither plaintiff nor defendant resided in the State or district the court was without jurisdiction and there was a demurrer and no waiver).

Explained in *Dodd v. Louisville Bridge Co.* (U. S. C. C.), 130 Fed. 186, 196 (as establishing that for the purposes of jurisdiction there is a conclusive presumption that all the stockholders of a corporation are citizens of the State creating it "when a corporation, for example, of Pennsylvania, is, by its own name, instead of the names of citizens, incorporated by a law, for example, of Indiana, this would make the Pennsylvania corporation, and not the citizens who were its stockholders, a citizen of Indiana, for jurisdictional purposes, notwithstanding the rule that the stockholders of the Pennsylvania corporation were still presumed to be citizens of Pennsylvania. *Memphis & Charleston Rd. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. ed. 518. Priority of creation of a corporation in this connection sometimes becomes important").

Cited in *Goodwin v. Boston & Maine Rd.* (U. S. C. C.), 127 Fed. 986, 989, "It should be noticed, * * * that the older and general doctrine of a convenient rule of fiction, which, for certain jurisdictional purposes, treats a railroad system operating continuous lines through several States, under

§ 179. Same Subject—Removal of Causes.

In *St. Joseph & Grand Island Railroad Co. v. Steele*,¹⁸ it is decided that a railroad company, owning and operating a line running through several States, may receive and exercise powers granted by each, but does not thereby become a citizen of every State it passes through, within the meaning of the jurisdiction clause of the Constitution of the United States. In *Goodlett v. Louisville & Nashville Rd. Co.*,¹⁹ the company was held to be a corporation of Kentucky and not of Tennessee inasmuch as it had from the latter State only a license to construct a railroad within its limits, between certain points, and to exert there some of its corporate powers. In *Pennsylvania Railroad Co. v. St. Louis, Alton & Terre Haute Railroad Co.*,²⁰ it is held that when an existing railroad corporation organized under the laws of one State, is authorized by the laws of another State to extend its road into the latter, it does not become a citizen of the latter State, unless the statute giving this permission must necessarily be construed as creating a new corporation of the State which grants this permission.

charters independently granted under the same name in the different States, as a citizen of the several States in which it operates, has apparently been questioned or qualified, in a sense, by more recent cases, like *Railroad v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *St. Louis & San Francisco Rd. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. ed. 802, and *Southern Ry. Co. v. Allison*, 130 U. S. 326, 23 Sup. Ct. 713, 47 L. ed. 1078. It is not necessary, however, to inquire in this case just how far such qualification results from the modern practice of taking a creative charter in one State, and ancillary or permissive charters in others, for the reason that the unmistakable trend of the authorities involving such situations is in the direction of treating citizenship for certain purposes as existing in the State of the corporate creation, or, in other words, in the State where the corporation was first chartered; and thus such authorities, if they bear at all upon the jurisdictional question here, sustain the view of the defendant." And the syllabus in this case reads: "The Boston & Maine Railroad, a corporation originally chartered in New Hampshire, but subsequently, by consolidation, also made a corporation of both Massachusetts and Maine, is a citizen of New Hampshire, in such sense that the Circuit Court of the United States in that State is without jurisdiction of an action against it by another citizen of New Hampshire on the ground of diversity of citizenship."

¹⁸ 167 U. S. 659, 663, 17 Sup. Ct. 925, 42 L. ed. 315.

¹⁹ 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. ed. 1230.

²⁰ 118 U. S. 290, 297, 30 L. ed. 83, 6 Sup. Ct. 1094.

In *Martin v. Baltimore & Ohio Railroad Co.*,²¹ it is held that under the act of Congress²² authorizing an action brought in a court of a State between citizens of different States to be removed into the Circuit Court of the United States "by the defendant or defendants therein, being nonresidents of that State," a defendant corporation must be created by the laws of another State only, in order to entitle it to remove the action; and if it is such a corporation, and has not also been created a corporation by the laws of the State in which an action has been brought against it, by a citizen thereof, it may remove the action, even if it has been licensed by the laws of the State to act within its territory, and is, therefore, subject to be sued in its courts. So in that case the *Baltimore & Ohio Railroad Co.*, was held to be a corporation of the State of Maryland only, though licensed by the State of West Virginia to act within its territory, and liable to be sued in its courts; and could, therefore, remove into the Federal Circuit Court for the District of West Virginia an action brought against it in a court of said State by a citizen thereof. A corporation incorporated simultaneously and freely in several States exists in each State by virtue of the laws of that State, and when it incurs a liability under the laws of one of the States in which it is incorporated and is sued therein it cannot escape the jurisdiction thereof and remove to the Federal Court on the ground that as it is also incorporated in the other States it is not a citizen of that State. A case of this character should be distinguished from those cases wherein a corporation originally incorporated in one State is compelled to become a corporation of another State so as to exercise its powers therein.²³

§ 180. Citizenship—Consolidated Corporations.

It is held in numerous cases that by consolidation a new

²¹ 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. 533.

²² Act of March 3, 1887, chap. 373, 24 Stat. at L. 552.

²³ *Patch v. Wabash Rd. Co.*, 207 U. S. 277, 28 Sup. Ct. 80, 52 L. ed. 208, distinguishing *Southern Ry. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. 713; *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. 621.

corporation is created and that the old consolidating companies cease their existence.²⁴ It is also held that a consolidation merges the franchises and privileges of each original corporation in the new company so that they continue to exist in respect thereto, that is, the old constituent companies retain their original status towards the public and the State the same as if the consolidation had not taken place.²⁵ But the consolidation of two companies does not necessarily work a dissolution of both, and the creation of a new corporation. Whether such be its effect, depends upon the legislative intent manifested in the statute under which the consolidation takes place.²⁶ It is held that a consolidated corporation is, for the purposes of jurisdiction, a citizen of either or each of the States under which it is organized.²⁷ In *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*,²⁸ it is decided that the Circuit Court of the United States for the District of Kentucky has jurisdiction of a suit brought by a corporation, originally created by the State of Indiana, against citizens of Kentucky

²⁴ *Shaw v. City of Covington*, 194 U. S. 593, 48 L. ed. 1131, 24 Sup. Ct. 754; *Minneapolis & St. Louis Ry. Co. v. Gardner*, 177 U. S. 332, 20 Sup. Ct. 656, 24 L. ed. 793; *Keokuk & Western R. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. 592; *Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499; *St. Louis, I. M. & S. Ry. Co. v. Berry*, 113 U. S. 465, 5 Sup. Ct. 529, 28 L. ed. 1055; *Clearwater v. Meredith*, 1 Wall. (68 U. S.) 25, 17 L. ed. 604; *Winn v. Wabash R. Co.*, 118 Fed. 55, 58; *Citizens' St. Ry. Co. v. City of Memphis*, 53 Fed. 715, 731, per Hammond, J.; *Market St. R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225. See *Rochester Ry. Co. v. City of Rochester*, 205 U. S. 236, 51 L. ed. 237, 27 Sup. Ct. 469, aff'g 182 N. Y. 116.

²⁵ *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. 69; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Branch v. Charleston*, 92 U. S. 677, 23 L. ed. 750; *Charleston, City of, v. Branch*, 15 Wall. (82 U. S.) 460, 21 L. ed. 189; *Citizens' St. Ry. Co. v. City of Memphis*, 53 Fed. 715, 731, per Hammond, J. See *Chesapeake & Ohio R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310; *Delaware Rd. Tax*, 18 Wall. (85 U. S.) 206, 21 L. ed. 888.

²⁶ *Central Railroad & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757; *Elison Electric Light Co. v. New Haven Electric Co.*, 35 Fed. 233, 236, per Shipman, J.; *Henderson v. Central Passenger Ry. Co.*, 21 Fed. 358, 364, per Barr, J.

²⁷ *Baldwin v. Chicago & N. W. R. Co. (U. S. C. C.)*, 86 Fed. 167; *Williamson v. Krohn (U. S. C. C. A.)*, 66 Fed. 655, 13 C. C. A. 668.

²⁸ 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. 821.

and of Illinois, even if the plaintiff was afterwards and before the suit made a corporation of Kentucky also, and pending the suit became a corporation of both Indiana and Illinois by reason of consolidation with a corporation of Illinois; but that the court cannot, in such a suit, adjudicate upon the rights and liabilities, if any, of the plaintiff as a corporation of Kentucky, or as a corporation of Illinois. In another case, however, it is held that railroad corporations created by two or more States, though joined in their interests, in the operation of their roads, in the issue of their stock and in the division of their profits, so as practically to be a single corporation, do not lose their identity, but each has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it was created, and the union of name, of officers, of business and of property does not change their distinctive character as separate corporations. In this case a railroad corporation was incorporated in New Hampshire, subsequently it was incorporated in Massachusetts under the same name with some of the same directors to form a junction with the former corporation's road. Thereafter the latter State provided for uniting the two corporations when the first named State should pass a similar enactment, which act was passed. A common stock was issued for the whole line and for forty-five years the two properties were under the management of one board of directors, but there was no other evidence that the stockholders had acted on these statutes. It was, therefore, held that the New Hampshire corporation being a citizen of that State, was entitled to go into the Circuit Court of Massachusetts and bring its bill there against a citizen of Massachusetts; and that its union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts, as to defeat its right to go into that court.²⁹

²⁹ *Nashua & Lowell Rd. Co. v. Boston & Lowell Rd. Co.*, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363.

§ 181. When Federal Court Has Jurisdiction—Corporation—Doing Business—Process—Service.

A corporation created by, and transacting business in a State is to be deemed an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting business is sufficient to give the Federal Circuit Court jurisdiction.³⁰

"A corporation may for the purposes of suit be said to be born where by law it is created and organized, and to reside

³⁰ *Louisville, Cincinnati & Charleston Rd. Co. v. Letson*, 2 How. (43 U. S.) 497, 11 L. ed. 55; Act of February 28, 1839, as to "inhabitants of or formed within the district" and absentee defendants.

Jurisdiction over foreign corporation doing business or having agent or office in State—service of process, see the following cases:

United States: *De Castro v. Compagnie Française du Télégraphe* (U. S. C. C.), 76 Fed. 425; *Gilbert v. New Zealand Ins. Co.* (U. S. C. C.), 49 Fed. 84, 15 L. R. A. 125, 21 Ins. L. J. 428; *Van Dresser v. Oregon R. & Nav. Co.* (U. S. C. C.), 48 Fed. 202, 11 Ry. Corp. L. J. 58; *Minford v. Old Dominion Steamship Co.* (U. S. C. C.), 48 Fed. 1; *Land & R. Imp. Co. v. Bardon* (U. S. C. C.), 45 Fed. 706; *Hohorst v. Hamburg-Amer. Packet Co.* (U. S. C. C.), 38 Fed. 273; *Denton v. International Co.* (U. S. C. C.), 36 Fed. 1.

Alabama: *Sullivan v. Sullivan Timber Co.*, 103 Ala. 11, 25 L. R. A. 543, 15 So. 941, 47 Am. & Eng. Corp. Cas. 511.

Illinois: *Northwestern L. Assoc. v. Stout*, 32 Ill. App. 31.

Indiana: *Rehm v. German Ins. & Sav. Inst.*, 125 Ind. 135, 25 N. E. 173, 44 Baltimore Underwriter, 254.

Minnesota: *Eichoff v. Fidelity & C. Co.*, 74 Minn. 130, 9 Am. & Eng. Corp. Cas. (N. S.) 379, 76 N. W. 1030.

Ohio: *Knox County Mut. Ins. Co. v. Bowersox*, 6 Ohio C. C. 275.

South Carolina: *Pollock v. Carolina Interstate Bldg. & L. Assoc.*, 48 S. C. 65, 25 S. E. 977.

Texas: *American Well Works v. De Aguayo* (Tex. Civ. App.), 53 S. W. 350; *Shane v. Mexican International R. Co.* (Tex. Civ. App.), 28 S. W. 456; *Home Forum B. O. of Ill. v. Jones*, 20 Tex. Civ. App. 68, 48 S. W. 219; *Western Union Teleg. Co. v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. 225.

Vermont: *Whitecomb v. Robbins*, 69 Vt. 477, 38 Atl. 233.

West Virginia: *Brabham v. Phoenix Ins. Co.*, 41 W. Va. 139, 23 S. E. 553; *Carson v. Phoenix Ins. Co.*, 41 W. Va. 136, 23 S. E. 552.

When a national bank fixes its principal place of business, under its articles of association, at a certain city, in pursuance of the provisions of the National Banking Act [Rev. Stat., § 5134 (U. S. Comp. Stat., 1901, p. 3454)] it is to be deemed a resident of the State wherein such city is situate, within the meaning of said statute. *Standard Oak Veneer Co.* (U. S. Dist. Ct.), 73 Fed. 103.

where, by or under the authority of its charter, its principal office is. A corporation, therefore, created by and organized under the laws of a particular State, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that State, possessing all the rights and having all the powers its charter confers.”³¹ The Circuit Court of the United States, held within one State, has jurisdiction of an action brought by a citizen and resident of another State, against a foreign corporation doing business in the first State through its regularly appointed agents, upon whom the summons is there served, for a cause of action arising in a foreign country; although the statutes of the State confer no authority upon any court to issue process against a foreign corporation, at the suit of a person not residing within the State, and for a cause of action not arising therein.³² A citizen of one State can sue a corporation which has been created by, and transacts its business in, another State, the suit being brought in the latter State, although some of the members of the corporation are not citizens of the State in which the suit is brought, and even though the State itself may be a member of the corporation.³³

In order, however, for a State Court to obtain jurisdiction over a foreign corporation having neither property nor agent within a State it is essential for the corporation to be doing business in the State.³⁴ So an insurance company with out-

³¹ *Railroad Co. v. Koontz*, 104 U. S. 5, 12, 26 L. ed. 643, per Mr. Chief Justice Waite; case is cited in *Utah-Nevada Co. v. De Lamar*, 113 Fed. 117, 66 C. C. A. 179.

³² *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. 526.

³³ *Louisville, Cincinnati & Charleston Rd. Co. v. Letson*, 2 How. (43 U. S.) 497, 11 L. ed. 55, reviewing and controlling *Commercial & Railroad Bk. of Vicksburg v. Slocomb*, 14 Pet. (39 U. S.) 60, 10 L. ed. 354; *Bank of United States v. Deveaux*, 5 Cranch (9 U. S.), 84, 3 L. ed. 44; *Curtiss v. Strawbridge*, 3 Cranch (7 U. S.), 267, 2 L. ed. 435.

³⁴ *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. 445, citing *Peterson v. Chicago, Rock Island & Pacific Railway Co.*, 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. 513; *Lumberman's Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. 483; *Conley v. Mathieson Alkali Works*, 190, 406, 47 L. ed. 1113, 23 Sup. Ct. 728; *Connecticut*

standing policies in a State on which it collects premiums and adjusts losses was held to be doing business within that State, so as to render it liable to an action, and that service, according to the law of the State, on a doctor sent to investigate the loss and having power to adjust the same is sufficient to give the State Court jurisdiction.³⁵ At common law there was no method by which a State Court could obtain jurisdiction over the person of a foreign corporation to render a personal judgment against it.³⁶ And by the common law, to maintain a personal action against a corporation, there must have been service of process upon the principal officer within the jurisdiction of the sovereignty creating it. The officer upon whom, in the sovereignty of its creation, service could be legally had, binding the corporation, it may be could be found in another jurisdiction, but he was not regarded as carrying with him his official functions, and service upon him there would not bind the corporation. State legislatures have, in order to obviate this inconvenience, and not infrequently injustice, enacted statutes providing a mode of service upon corporate representatives or agents within the State of the enactment.³⁷

§ 182. When Federal Court Has no Jurisdiction—Corporation—Doing Business.

Where a corporation has never maintained an office in a certain State for the transaction of business and has never had any resident agent there, or transacted any other business therein, save the soliciting of orders by mail or traveling sales-

Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. 308;
Barrow Steamship Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. 526;
Gibley v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. 559;
St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. 354

³⁵ *Commercial Mut. Accident Co. v. Davis*, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. 445.

³⁶ *Swarts v. Christie Grain & Stock Co.* (U. S. C. C.), 166 Fed. 338, citing *St. Clair v. Cox*, 106 U. S. 355, 1 Sup. Ct. 354, 27 L. ed. 222; *Strain v. Chicago Portrait Co.* (U. S. C. C.), 126 Fed. 831.

³⁷ *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 153, 82 Am. St. Rep. 38, per *Tyson, J.*, a case as to the jurisdiction of courts over a foreign corporation for a tort committed by it in another State.

men, to be submitted for approval, such corporation is not "doing business within the State" so as to be subject to suit therein.³⁸ While in a case of diverse citizenship the suit may be brought in the Circuit Court for the district of the residence of either party, there must be service within the district; and if the defendant is a nonresident corporation service can only be made upon it if it is doing business in that district in such a manner, and to such an extent, as to warrant the inference that it is present there through its agent. But a railroad company which has no tracks within the district is not doing business therein in the sense that liability for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic.³⁹ By virtue of the acts of 1887 and 1888⁴⁰ a corporation incorporated by a State of the Union cannot be compelled to answer to a suit for infringement of a trade-mark⁴¹ in a district in which it is not incorporated and of which the plaintiff is not an inhabitant although it does business and has a general agent in that district.⁴²

§ 183. Where Plaintiffs Citizens of Different States.

Where suit is brought in the district of defendant's residence by plaintiffs who are citizens of other States than that of

³⁸ *William Grace Co. v. Henry Martin Brick Mach. Mfg. Co.* (U. S. C. C. A.), 174 Fed. 131, citing *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. ed. 916; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. 728; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517; *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. ed. 608; *Wall v. Chesapeake & Ohio Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129; *Houston v. Filer Stowell Co. (C. C.)*, 85 Fed. 757; *Fairbank & Co. v. Cincinnati & N. O. Ry. Co.*, 54 Fed. 420, 423, 4 C. C. A. 403, 38 L. R. A. 271; *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557; *March-Davis Cycle Mfg. Co. v. Strobbridge Lithographing Co.*, 79 Ill. App. 683.

³⁹ *Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. ed. 916, aff'g 147 Fed. 767.

⁴⁰ Act of March 3, 1887, as corrected by act of August 13, 1888, chap. 866.

⁴¹ Under the act of March 3, 1881, chap. 138.

⁴² *Keasbey & Mattison Co., In re*, 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. 273. See *Westinghouse Air Brake Co. v. Great Northern Ry. Co.*, 88 Fed. 260; *Southern Pac. Co. v. Earle*, 82 Fed. 694.

defendant, the Circuit Court has jurisdiction, although plaintiffs are not themselves citizens of the same State.⁴³

§ 184. Citizenship—Territory Divided Into Two States.

Under the act of Congress ⁴⁴ for the division of the Territory of Dakota into two States, and for the admission of those and other States into the Union, and providing that the Circuit and District Courts of the United States shall be the successors of the Supreme and District Courts of each Territory, as to all cases pending at the admission of the State into the Union, "whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases," the Circuit Court of the United States for the District of South Dakota has jurisdiction, at the written request of either party, of an action brought in a District Court of that part of the Territory of Dakota which afterwards became the State of South Dakota, by a citizen of that part of the Territory, since a citizen of the State, against a citizen of another State, and pending on appeal in the Supreme Court of the Territory at the time of the admission of the State into the Union.⁴⁵

§ 185. Jurisdiction of Circuit Court—Citizenship of Guardian in Suit Against Corporation.

Where it appeared from the statutes of Texas and the decisions of the highest court of that State that a general guardian has the legal right to bring a suit in the State Courts of Texas in his own name, it follows that a citizen and resident of the Western District of Texas, who has been duly appointed by the proper court of Texas the guardian of the person and estate of a minor, whose father and mother are residents, citizens and inhabitants of another State and are not and never have been residents, citizens or inhabitants of Texas,

⁴³ *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 26 Sup. Ct. 55, 50 L. ed. 178.

⁴⁴ Act of February 22, 1889, chap. 180.

⁴⁵ *Koenigsberger v. Richmond Silver Mining Co.*, 158 U. S. 41, 39 L. ed. 889, 15 Sup. Ct. 751.

may bring an action in his own name in the United States Circuit Court for the Western District of Texas against a corporation of another State, as the jurisdiction of the Circuit Court is dependent on the citizenship of the guardian and not on the citizenship of the ward.⁴⁶

§ 186. Citizenship of State—Diverse Citizenship.

A State is not a citizen within the meaning of the provisions of the Constitution or acts of Congress regulating the jurisdiction of the Federal Courts.⁴⁷ And in a suit against a corporation by one State, an averment that the defendant is a body politic by the law of another State, named and doing business in it, is not sufficient to give jurisdiction to the Federal Supreme Court; and that court has no original jurisdiction of a suit brought by a State against one of its own citizens.⁴⁸

Under the Judiciary Acts of the United States, a suit taken between a State and a citizen or corporation of another State is not a suit between citizens of different States; and the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States.⁴⁹

A State cannot maintain an action in equity to restrain a corporation from violating the provisions of the Antitrust Act⁵⁰ on the ground that such violation by decreasing competition would depreciate the value of its public lands and enhance the cost of maintaining its public institutions, the damages resulting from such violations being remote and indirect and not such direct actual injury as is provided for in

⁴⁶ *Mexican Central Ry. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. 211.

⁴⁷ *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598.

⁴⁸ *Pennsylvania v. Quicksilver Co.*, 10 Wall. (77 U. S.) 553, 19 L. ed. 998.

⁴⁹ *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. ed. 231.

The Federal Circuit Courts have no jurisdiction based upon diverse citizenship of a suit between a State and a citizen or corporation of another State. *State of Arkansas v. Kansas & T. Coal Co.* (U. S. C. C.), 96 Fed. 353.

⁵⁰ Act of July 2, 1890, 26 Stat. 209.

§ 7 of the act. The object of said enactment was to limit direct proceedings in equity to prevent and restrain such violations of the said act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations to those instituted in the name of the United States, under § 4 of the act, by district attorneys of the United States, acting under direction of the attorney-general; thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country.⁵¹

But a bill in equity, filed in the name of a State, seeking to prevent by injunction a corporation organized under the laws of another State, with power to hold and acquire shares of the capital stock of any other corporation, from obtaining and exercising ownership and control of two or more competing railroad companies of the State, so as to evade and defeat its laws and policy forbidding the consolidation of such railroads when parallel and competing, is a controversy of which the Federal Supreme Court has jurisdiction.⁵²

Again, if the real controversy is between citizens of different States a Federal Court will retain jurisdiction even though the name of a State, supposed to be a necessary party, is formally used, where the ground of action is an attachment bond payable to said State as provided by statute which authorizes a suit thereon by any party injured.⁵³

The courts of a State may also take cognizance of a suit brought by the State, in its own courts, against citizens of other States, subject to the right of the defendant to have such suit removed to the proper Circuit Court of the United States, whenever the removal thereof is authorized by act of Congress, and subject also to the authority of the Supreme

⁵¹ *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. ed. 870.

⁵² *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. ed. 499.

⁵³ *State, Ranch, v. Bowles Milling Co.* (U. S. C. C.), 80 Fed. 161.

Court to review the final judgment of the State Court, if the case be one within its appellate jurisdiction.⁵⁴

§ 187. Jurisdiction—Where “Found”—Suit to Restrain Enforcement Unreasonable Rates by Railroad Corporation.

Under the act of 1875⁵⁵ a cause cognizable in the Federal Courts could be brought against a defendant in any district wherein he might be found at the time of serving process. The Interstate Commerce Act was passed when this statute was in force. The acts of 1887 and 1888,⁵⁶ providing that no civil suit shall be brought before either the Circuit Court or the District Court “against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,” being limited to actions of which there is concurrent jurisdiction in State Courts, do not apply to an action in which the Federal jurisdiction is exclusive, and, therefore, a suit to restrain railroad corporations from enforcing unreasonable rates contrary to the Interstate Commerce Act⁵⁷ can be brought in any district in which the defendants can be found.⁵⁸

§ 188. Jurisdiction—Transitory Action of Trespass—Parties Residents of Other States Than That of Suit.

It is held in a Mississippi case that in a transitory action of trespass the fact that both the plaintiff and the defendant, a foreign corporation, were and continued to be residents and citizens of another State constituted no defense; and that the

⁵⁴ *Plaquemines Trop. Fruit Co. v. Henderson*, 170 U. S. 511, 42 L. ed. 1126, 18 Sup. Ct. 685.

⁵⁵ Act of March 3, 1875, chap. 137, 18 Stat. 470, U. S. Comp. Stat., 1901, p. 508.

⁵⁶ Act of March 3, 1887, chap. 373, 24 Stat. 552, U. S. Comp. Stat., 1901, p. 508; Act of August 13, 1888, chap. 866, 25 Stat. 433, U. S. Comp. Stat., 1901, p. 508.

⁵⁷ Act of February 4, 1887, chap. 104, 24 Stat. 379, U. S. Comp. Stat., 1901, p. 3154.

⁵⁸ So held in *Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfg.'s Assn.* (U. S. C. C. A.), 165 Fed. 1, followed in *Union Pac. Rd. Co. v. Oregon & Washington Lumber Mfg.'s Assn.* (U. S. C. C. A.), 165 Fed. 13.

fact that the injury was inflicted or the wrong done in another State than that of suit was also no defense. "We are aware that there is some divergence of opinion on this subject between the courts of last resort in this country, and that apparent authority can be found for holding that a foreign corporation resident in one State may not be sued in another State by a resident in the first State on a cause of action arising in the first State. But even these cases will be found to be governed by the peculiar statutes of the State declining to take jurisdiction, or that the refusal to take jurisdiction rested upon some unusual circumstance which deterred the court from entertaining the suit, or because of a supposed distinction between statutory rights and common-law rights. But in many States, and amongst them our own, the rule we first announced has been firmly established by repeated adjudications."⁵⁹

§ 189. When Federal Courts no Jurisdiction of Suit by Assignee of Chose in Action—Assignment of Judgment.

In a late case in the Federal Circuit Court the cause of action arose in the following manner: A corporation of the State of New York made a promissory note to the order of a certain company, payable in four months. This note was duly indorsed by the payee and was afterwards transferred before maturity to a national bank of Pennsylvania. Said bank obtained judgment in the Supreme Court of New York against the maker and payee, and issued execution thereon, which

⁵⁹ Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 796, 797, per Woods, C. J., citing or reviewing New Orleans, Jackson & Great Northern Rd. Co. v. Wallace, 50 Miss. 244; Chicago, St. Louis & New Orleans Rd. Co. v. Doyle, 60 Miss. 977; Illinois Cent. Rd. Co. v. Credup, 63 Miss. 291; McMaster v. Illinois Cent. Rd. Co., 65 Miss. 764, 4 So. 59; Burns v. Grand Rapids & Indiana Rd. Co., 113 Ind. 169, 15 N. E. 230; Knight v. West Jersey Rd. Co., 108 Pa. St. 250; Eingartner v. Illinois Steel Co., 94 Wis. 70, 34 L. R. A. 503.

Code of 1892, of said State, § 849, provides: "*Of foreign corporations.* Corporations which exist by the laws of any other State of the Union, by the acts of Congress, or the laws of any foreign State, may sue in this State by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against," etc.

writ was returned unsatisfied, but before this suit was brought the bank "duly sold, assigned, and transferred to this plaintiff all of its right, title, and interest in and to said judgment, and all of the rights and remedies to which it was or might become entitled under and by virtue of the laws of the State of New York, by reason of being the owner of said debt and of the subsequent proceedings taken by it for the collection of the same and by virtue of the corporation laws of the State of New York." It was also claimed that the defendant was a stockholder in the corporation, maker of the note, and that by virtue of such holding he was liable under the laws of New York for the full amount of the judgment. Upon these facts the defendant moved to dismiss the suit upon the ground that the plaintiff was proceeding upon a chose in action, that the title thereto was derived from an assignor, who could not have maintained the action in said Federal Court. Outside of these facts a controversy apparently existed within the jurisdiction of the Circuit Court, because of diverse citizenship of the parties. It was held under the statute making, for the purpose of jurisdiction of Federal Courts, national banks citizens of the States in which they are respectively located, and also providing that no Circuit or District Court shall have cognizance of any suit on a promissory note or chose in action brought by an assignee, unless such suit might have been prosecuted in such court if no assignment or transfer had been made, that the above assignment of a chose in action prevented the plaintiff as assignee of the bank to maintain this suit; that the judgment was a chose in action preventing this suit by plaintiff under the above mentioned statute.⁶⁰

⁶⁰ *Sullivan v. Ayer* (U. S. C. C.), 174 Fed. 199. The court per McPherson, Dist. J., said: "In considering this position, it should first be observed that the original note was merged in the judgment. As was said in *Ober v. Gallagher*, 93 U. S. 206, 23 L. ed. 829: 'The note was no longer in existence as an outstanding liability. It had been merged in the judgment, and was, as a note, extinguished. Gallagher no longer claims as assignee of the note, but as the owner of a judgment in his favor against Thompson.'

"In the collection of its judgment, therefore, the bank no longer pro-

**§ 190. Jurisdiction Federal Courts—Suits by Assignee—
Inquiry Relates to Time When Suit Is Brought.**

The inquiry as to the jurisdiction of the Circuit Court of
ceded upon the note, and upon the assignment or indorsement thereof, but
upon the judgment itself. If the bank had been thus proceeding against
Ayer in this court to enforce the statutory liability (whatever that may be)
created by the laws of New York, it would have been met by the objection
that the action could not be maintained in this forum, because the follow-
ing provision of act of March 3, 1887, chap. 373, § 4, 24 Stat. 554 (1 U. S.
Comp. Stat., 1901, p. 514), is in the way: '§ 4. All national banking asso-
ciations established under the laws of the United States shall, for the pur-
poses of all actions by or against them real, personal or mixed, and all suits
in equity, be deemed citizens of the States in which they are respectively
located; and in such cases the Circuit and District Courts shall not have
jurisdiction other than such as they would have in cases between individual
citizens of the same State.'

"This being so, it follows, I think, that § 1 of the same statute [24 Stat.
552 (1 U. S. Comp. Stat., 1901, p. 508)] forbids the plaintiff also, as assignee
of the bank, to maintain the suit in this court. The relevant language of
the section is as follows: 'nor shall any Circuit or District Court have cog-
nizance of any suit * * * to recover the contents of any promissory
note or other chose in action in favor of any assignee * * * unless such
suit might have been prosecuted in such court to recover the said contents
if no assignment or transfer had been made.'

"The remaining question, therefore, is whether the present action is
brought to recover the contents of a chose in action, and upon this question
the decisions seem to leave no room for doubt. A judgment is a chose in
action. The contents of a judgment, like the contents of the promissory
note of which Chief Justice Marshall was speaking in *Sere v. Pitot*, 6 Cranch
(U. S.), 335, 3 L. ed. 240, 'are the sum it shows to be due;' and this suit is
brought to recover the sum due upon the judgment recovered by the bank,
because that record forms the indispensable foundation of the action. If
this were an action of debt upon the judgment, in which the Steel Company
was pursued before some other tribunal than the Supreme Court of New
York, there could, of course, be no doubt that the suit was brought to re-
cover the contents of the judgment. And while it is true that the present
proceeding is not directed against the Steel Company, and that the judg-
ment alone would not support a recovery against the defendant Ayer, it is
also true that the plaintiff is seeking to recover from him the sum due upon
the judgment, and nothing else. The liability of the defendant depends
upon the relation he bears to the Steel Company, and this, therefore, is a
necessary part of the inquiry; but the object of the suit is to obtain a satis-
faction of the judgment, and the enforcement of his statutory liability is
merely a means to that end. When the money due upon the judgment is
collected, its contents are recovered, and it is only a step in the process of
recovery to invoke the defendant's liability as a stockholder. *Corbin v.*
Black Hawk County, 105 U. S. 659, 26 L. ed. 1136; *Shoecraft v. Bloxham*,

suits to recover the contents of choses in action relates, so far as the assignors are concerned, to the time when the suit is brought. If at that time the assignors could have brought suit in the Circuit Court, it is immaterial whether they could have done so when the assignment was made.⁶¹

§ 191. Jurisdiction of Federal Courts—Suits by Assignee of Promissory Note or Chose in Action—Exceptions to Statutory Prohibition.

A Circuit Court has no jurisdiction for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees except over (1) suits upon foreign bills of exchange; (2) suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; (3) suits upon choses in action payable to bearer, and made by a corporation.⁶²

Where the instruments sued on are payable to bearer, and are made by a corporation, they are expressly excepted by the Judiciary Act⁶³ from the general rule prescribed in it that an assignee or subsequent holder of a promissory note or chose in action could not sue in a Circuit or District Court of the United States, unless his assignor or transferrer could have sued in such court.⁶⁴

The Circuit Court of the United States for the Eastern District of Louisiana has jurisdiction of a suit brought in it by a citizen of New York to recover from the city of New

124 U. S. 730, 8 Sup. Ct. 686, 31 L. ed. 574; *Mexican Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 566, 39 L. ed. 672. The rule to dismiss is made absolute."

As to merger in judgment, see *Freeman on Judgments* (4th ed.), §§ 221 *et seq.*

Suits by assignees under above statute, see 4 Fed. Stat. Annot., note pp. 306 *et seq.*

⁶¹ *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. 770.

⁶² *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. 329. Approving *Newgass v. New Orleans*, 33 Fed. 196.

⁶³ Act of August 13, 1888, chap. 866.

⁶⁴ *Lake Co. Commrs. v. Dudley*, 173 U. S. 243, 43 L. ed. 684, 19 Sup. Ct. 398.

Orleans on a number of certificates, payable to bearer, made by the city, although the petition contains no averment that the suit could have been maintained by the assignors of the claims or certificates sued upon.⁶⁵

§ 192. When Federal Courts Have Jurisdiction of Suits by Assignee.

A suit filed in equity by the assignee of a mortgage to set aside tax deeds and a foreclosure decree is not a suit to recover the contents of a chose in action within the meaning of the act of 1875.⁶⁶ Where notes are made by a corporation payable to the order of its own treasurer, a citizen of the same State, as a matter of convenience and custom, and indorsed and delivered by him to a *bona fide* holder who, a citizen of a different State, furnishes the money represented by the note directly to the corporation, the treasurer is not in fact an assignee of the note within the meaning of the act of 1888,⁶⁷ and suit may be brought by such holder in the Circuit Court of the United States having jurisdiction of the parties, notwithstanding such diversity does not exist as to the treasurer first indorsing the note.⁶⁸ In another case the maker of a promissory note signed it entirely for the benefit of the payee, who was really the party for whose use it was made. The maker and the payee were citizens of the same State. A citizen of another State discounted the note, and paid full consideration for it to the payee who indorsed it to him. The note not being paid at maturity, the indorsee, who had not parted with it, brought suit upon it against the maker in the Circuit Court of the United States. It was held that the court had jurisdiction, notwithstanding the provision in the act of 1888 ⁶⁹ that such court shall not have cognizance of a suit to recover the contents of a promissory note in favor of an assignee or

⁶⁵ *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. 329.

⁶⁶ *Hobe-Peters Land Co. v. Farr* (U. S. C. C.), 170 Fed. 644.

⁶⁷ Act of August 13, 1888, 25 Stat. 433.

⁶⁸ *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801, rev'g 132 Fed. 848.

⁶⁹ Act of August 13, 1888, 25 Stat. 433, 434, chap. 866.

subsequent holder, unless such suit might have been prosecuted in such court if no assignment had been made.⁷⁰ A bill filed by the assignee of a mortgage, and holding only an equitable title, to establish his title and interest and quiet said title and to cancel tax deeds and a judgment of foreclosure, is within the jurisdiction of a Federal Court of equity even though the tax deeds held by defendants carry the constructive or presumptive possession of the land and complainant is out of possession, where under the State law the latter could obtain the legal title in time to sue as above with any possibility of success, and as he could not maintain ejectment his only remedy was an action in equity. Such a case is an exception to the rule that a person out of possession cannot maintain a suit in equity to quiet title against a person in possession; and to the further rule that the equitable and legal titles must be joined in the complainant before beginning suit.⁷¹

§ 193. When Federal Court no Jurisdiction of Suit by Assignee—Contract to Convey Land.

A Circuit Court of the United States has no jurisdiction over a suit to enforce a contract for the conveyance of land brought in the State where the land is situated, by the assignee of one party to the contract against the other party, if both parties to the contract are citizens of the same State although the assignee is a citizen of a different State.⁷²

§ 194. Motive for Bringing Suit or in Obtaining Citizenship—Collusive Assignment or Transfer or Fraud To Give Jurisdiction.

Where the averments of the bill are true, and there is no question as to the diversity of citizenship, or any evidence that a case was fraudulently created to give jurisdiction to the

⁷⁰ *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. 288.

⁷¹ *Hobe-Peters Land Co. v. Farr* (U. S. C. C.), 170 Fed. 644, citing to the exception *Big Six Development Co. v. Mitchell*, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332.

⁷² *Plant Investment Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 38 L. ed. 358, 14 Sup. Ct. 483.

Federal Court, the case will not be regarded as collusive merely because the parties preferred to resort to the Federal Court instead of to a State Court; in the absence of any improper act the motive for bringing the suit is unimportant.⁷³ Or, to state the proposition in another form, where there is a proper cause of action and diverse citizenship, jurisdiction of the Federal Courts exists, and the motive of the creditor who desires to litigate in that forum is immaterial, and does not affect the jurisdiction; nor is such jurisdiction if it actually exists, affected by the fact that a receivership was in view when judgments were entered.⁷⁴ But while jurisdiction of the United States Circuit Court exists even if a complainant's motive in acquiring citizenship was to invoke that jurisdiction, the citizenship must be real, and actually with the purpose of establishing a permanent domicile.⁷⁵ It is an established doctrine, adhered to in the Federal Supreme Court, that the constitutional privilege of a grantee or purchaser of property, being a citizen of one of the States, to invoke the jurisdiction of a Circuit Court of the United States for the protection of his right as against a citizen of another State, the value of the matter in dispute being sufficient for the purpose, cannot be impaired or affected merely because of the motive that induced his grantor to convey, or his vendee to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which the title passed without the grantor or vendor reserving or having the right or power to compel or require a reconveyance or return to him of the property in question.⁷⁶ So a *bona fide* and absolute transfer

⁷³ *Metropolitan Railway Receivership, In re*, 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. 219.

⁷⁴ *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801, rev'g 132 Fed. 848. See also *South Dakota v. North Carolina*, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. ed. 448.

⁷⁵ *Miller & Lux, Incorp'd, v. East Side Canal & Irrigation Co.*, 211 U. S. 293, 53 L. ed. 189, 29 Sup. Ct. 111; Act of Congress, March 3, 1875, chap. 137, § 5, 18 Stat. 470, 472; Act of Congress, March 3, 1891, chap. 517, 26 Stat. 326.

⁷⁶ *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. ed. 444, cited in *Acord v. Western Pocahontas Corp.* (U. S. C. C.), 156

of a cause of action to a citizen of another State to enable a suit to be brought does not defeat jurisdiction.⁷⁷ The fact that a domestic corporation permitted a mortgage on lands owned by it to be foreclosed, and that another corporation having in part the same officers and stockholders was organized in another State, which purchased such lands at the sale and also the stock of the former corporation, which was thereafter dissolved, is held not sufficient to establish a collusive transfer of the lands, for the purpose of enabling a suit in respect thereto to be brought in a Federal Court, such as deprived it of jurisdiction of such suit.⁷⁸ Again, assignments obtained by plaintiff without consideration and held practically in trust for the assignors, that is, where the proceeds, or some portion of them are to be turned back to the assignors in the event of success would constitute a collusive assignment,⁷⁹ but where

Fed. 989, 1000. See *Lehigh Mining & Mfg. Co., In re*, 156 U. S. 322, 15 Sup. Ct. 375, 39 L. ed. 438.

Where the organization of a corporation is procured for beneficial purposes in subdividing lands and irrigating the same, and exercising eminent domain, and there is no evidence of any intention to reconvey the title to the land an objection that there is an organization of a corporation for the purpose of a fictitious conveyance to it will not be sustained in an action by a foreign corporation to quiet title to water rights, as there is not such collusion as to defeat jurisdiction. *Irvine Co. v. Bond* (U. S. C. C.), 74 Fed. 849.

When transfer by partnership to corporation is not simulated or sham so as to oust court of jurisdiction, see *Slaughter v. Mallet Land & Cattle Co.* (U. S. C. C. A.), 141 Fed. 282.

Jurisdiction not defeated by selecting administrator to obtain requisite citizenship for jurisdiction, see *Goff v. Norfolk & W. R. Co.* (U. S. C. C.), 36 Fed. 299.

When not sufficiently clear that purpose of incorporation was solely to invoke jurisdiction and so defeat it, see *Percy Summer Club v. Astle* (U. S. C. C. A.), 163 Fed. 1; s. c., 166 Fed. 1020 (mem.), denying rehearing.

⁷⁷ *Cole v. Philadelphia & Easton Ry. Co.* (U. S. C. C.), 140 Fed. 944.

⁷⁸ Syllabus to *Acord v. Western Pocahontas Corp.* (U. S. C. C.), 156 Fed. 989.

⁷⁹ *Hartford Fire Ins. Co. v. Erie Rd. Co.* (U. S. C. C.), 172 Fed. 899, 902, citing *Farmington v. Pillsbury*, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. ed. 114; *Lehigh Mining Co. v. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. ed. 444; *Lake County Commissioners v. Dudley*, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. ed. 684; *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. ed. 552.

the plaintiff under such circumstances obtains no greater rights of jurisdiction than the assignor had itself and the jurisdictional amount is exceeded, such assignment is not collusive so as to deprive a Federal Court of jurisdiction.⁸⁰

§ 195. Same Subject—When Jurisdiction Defeated.

The facts may be such as to make a transaction a mere device to give jurisdiction to the Circuit Court, and constitute a fraud upon said court, as well as a wrong to the defendant, and prevent the jurisdiction of the court from being exercised. Thus in a Federal Supreme Court case citizens of Virginia were in possession of lands in that State, claiming title, to which also a corporation organized under the laws of Virginia had for some years laid claim. In order to transfer the corporation's title and claim to a citizen of another State, thus giving the Federal Circuit Court jurisdiction over an action to recover the lands, the stockholders of the Virginia corporation organized themselves into a corporation under the laws of Pennsylvania, and the Virginia corporation then conveyed the lands to the Pennsylvania corporation, and the latter corporation brought action against citizens of Virginia to recover possession of the land. No consideration passed for the transfer, and at the time of suit both corporations were in existence.⁸¹ A corporation organized by citizens of one State in another State simply for the purpose of bringing suits on causes of action against citizens of the former State in the Federal Courts where jurisdiction would not otherwise exist is a sham, and ⁸² a suit brought by such a corporation does not really and substantially involve a dispute within the jurisdiction of the Circuit Court and should be dismissed as soon as such facts have been ascer-

⁸⁰ *Hartford Fire Ins. Co. v. Erie R. Co.* (U. S. C. C.), 172 Fed. 899, distinguishing *Lake County Commissioners v. Dudley*, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. ed. 684, in that it did not appear therein that Dudley had procured enough coupons from any one of the nonresident assignors to bring the case as to him up to the jurisdictional amount.

⁸¹ *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. ed. 444. See *Lehigh Mining & Mfg. Co., In re*, 156 U. S. 322, 39 L. ed. 438, 5 Sup. Ct. 375.

⁸² Under § 5 of the act of March 3, 1875, chap. 137, 18 Stat. 470.

tained.⁵³ Assignment of stock and bonds of little value to a stenographer in the office of a corporation's attorney to enable him to sign a bill in the Federal Court for the appointment of a receiver constitutes a fraud on the court's jurisdiction and defeats the suit.⁵⁴ So where the complainant corporation was organized for the sole purpose of invoking the jurisdiction of the Federal Circuit Court, and any decree in its favor would be really under the control and for the benefit of another corporation of the same State as defendant, the suit should be dismissed as one so organized for the purpose of creating a case cognizable in the Circuit Court.⁵⁵ And where from the evidence of the plaintiff below, it is clear that he does not own any of the coupons sued on, and that his name is being used with his own consent, to give jurisdiction to the Circuit Court to render judgment for persons who could not have invoked the jurisdiction of a Federal Court, the trial court, on its own motion, should have dismissed the case, without considering the merits.⁵⁶

§ 196. Jurisdiction—Rearrangement of Parties—Diverse Citizenship.

An arrangement of parties which is merely a contrivance between friends to found jurisdiction on diverse citizenship in the Circuit Court will not avail, and when it is obvious that

⁵³ *Southern Realty Investment Co. v. Walker*, 211 U. S. 603, 53 L. ed. 346, 29 Sup. Ct. 211.

⁵⁴ *Kreider v. Cole* (U. S. C. C. A.), 149 Fed. 647.

⁵⁵ *Miller & Lux, Incorp'd, v. East Side Canal & Irrigation Co.*, 211 U. S. 293, 53 L. ed. 189, 29 Sup. Ct. 111, citing *Steigleder v. McQuesten*, 198 U. S. 141, 143, 49 L. ed. 986, 25 Sup. Ct. 616; *Waite v. Santa Cruz*, 184 U. S. 302, 325, 22 Sup. Ct. 327, 46 L. ed. 552; *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. 307, which is cited in *Lake County Commissioners v. Dudley*, 173 U. S. 243, 251, 43 L. ed. 684, 19 Sup. Ct. 398; *Turnbull v. Ross*, 141 Fed. 649, 652; *Scott v. Mineral Development Co.*, 130 Fed. 497, 499; *Board of Commissioners of Lake County v. Schrad-skey*, 97 Fed. 1, 2; *Alabama Great Southern Rd. Co. v. Carroll*, 84 Fed. 772, 780; *Ashley v. Board of Supervisors*, 83 Fed. 534, 537; *Jackson v. Fidelity & Casualty Co.*, 75 Fed. 359, 370.

⁵⁶ *Lake Co. Commrs. v. Dudley*, 173 U. S. 243, 43 L. ed. 684, 19 Sup. Ct. 398.

a party who is really on complainant's side has been made a defendant for jurisdictional reasons, and for the purpose of reopening in the United States courts a controversy already decided in the State courts, the Court will look beyond the pleadings and arrange the parties according to their actual sides in the dispute.⁵⁷

⁵⁷ *Dawson, City of, v. Columbia Ave. Sav. Fund, S. D. T. & T. Co.*, 197 U. S. 178, 25 Sup. Ct. 420, 49 L. ed. 713.

JURISDICTION OF COURTS

CHAPTER XIII

JURISDICTION OF COURTS OVER CORPORATIONS CONTINUED

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§ 197. Nature of Jurisdiction of National Courts—Extent of Resort to Common Law.

While the jurisdiction of the national courts is limited they are not inferior courts, and their judgments present every attribute of finality and estoppel which appertain to those of general jurisdiction.¹ The common law cannot be resorted to for aid in giving jurisdiction to the Federal Courts, but only in deciding certain questions after jurisdiction is otherwise obtained.²

§ 198. Federal Jurisdiction—Effect of State Statutes—Rights and Remedies.

A State cannot by any statutory provisions withdraw a suit in which there is a controversy between citizens of different States, from the cognizance of the Federal Courts.³ The equity jurisdiction of the Federal Courts is not subject to limitations or restraints by State legislation giving jurisdiction to State Courts over similar matters.⁴

Where an insurance company, citizen of one State, has voluntarily accepted a license from another State, and has been sued in a court of that State, the fact that the license is subject to be revoked if the company should remove the action to the Federal Courts, furnishes no ground for appealing to a Federal Court to take jurisdiction of a suit in equity to cancel the policy if otherwise the court would have no jurisdiction.⁵ But a foreign corporation may be precluded from enforcing

¹ First National Bk. of Belle Fourche, *In re* (U. S. C. C. A.), 152 Fed. 64.

Limited and special jurisdiction of Federal Supreme Court, see *Rhode Island v. Massachusetts*, 12 Pet. (37 U. S.), 657, 9 L. ed. 1233.

² *United States v. New Bedford Bridge*, 1 Woodb. & Min. (U. S. C. C., 1846), 401 Fed. Cas. No. 15,867. Indictment; obstructing navigable waters by bridge; necessity of further legislation in Congress to punish crimes; nonjurisdiction in Federal Courts over crimes unless some part of Constitution or a treaty or some law of Congress makes it a crime.

³ *Madisonville Traction Co. v. Saint Bernard Min. Co.*, 196 U. S. 239, 49 L. ed. 262, 25 Sup. Ct. 251. See *South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 141 Fed. 582.

⁴ *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 30 Sup. Ct. —, 54 L. ed. —; *National Surety Co. v. State Bank*, 120 Fed. 593.

⁵ *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 48 L. ed. 188, 24 Sup. Ct. 74.

by action in a State or Federal Court a contract made in the State where its statute forbids it to do business therein until it has filed a declaration, appointed an agent upon whom the service of process may be made and prohibiting suing in the courts until it has done so.⁶ A State also has the power to prevent a foreign corporation from doing business at all within its borders unless such prohibition is so conditioned as to violate the Federal Constitution, and a State statute which, without requiring a foreign insurance company to enter into any agreement not to remove into the Federal Courts cases commenced against it in the State Court, provides that if the company does so remove such a case its license to do business within the State shall thereupon be revoked is unconstitutional.⁷ Statutes and decisions of the courts of last resort of the several States defining what may or may not constitute a cloud on title, what may or may not constitute title itself or claim or color of title, and what may by possession ripen into good title, although void *in initio*, are parts of the substantive law of such States, affecting real estate therein, and are of controlling influence in Federal Courts held within such States, under well-settled authority.⁸ But rights and remedies in equity in the Federal Courts may, however, so it is held, be enlarged since a party by going into such courts may avail himself of, and does not lose any right or proper remedy which he might have had in the State Courts in the same locality; that is, statutory rights of such party available in the State Courts may be enforced in the Federal Courts in accordance with the nature of the right or remedy whether it be at law, in equity or admiralty.⁹

⁶ *La Moine Lumber & Traction Co. v. Kesteson* (U. S. C. C.), 171 Fed. 980.

⁷ *Security Mutual Life Ins. Co. v. Prewitt, Ins. Comm.*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. 619, following *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148, and held not to be overruled by *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. ed. 915, or any other decision of the Supreme Court.

⁸ *Acord v. Western Pocahontas Corporation* (U. S. C. C.), 156 Fed. 989, 998, per Dayton, Dist. J.

⁹ *National Surety Co. v. State Bank*, 120 Fed. 593; see *Davis v. Gray*, 16 Wall. (U. S.) 203, 221, 21 L. ed. 447.

§ 199. Power of State to Limit Jurisdiction of Its Courts—Power to Administer Common Law.

The State Court determines the extent and limitations of powers conferred on its corporations.¹⁰ Subject to the restrictions of the Federal Constitution the State may determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them. The State's own policy determines the extent to which it will entertain in its courts transitory actions where the causes of action have arisen in other jurisdictions. But any policy adopted by a State must operate in the same way on its own citizens and those of other States; privileges afforded to one class must also be extended to the other. If a State discriminates as to the right to sue in favor of its own citizens against citizens of other States such act conflicts with the provisions of the

State legislature cannot change or modify maritime law. *Butler v. Boston & S. Steamship Co.*, 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. 612, 6 Rd. & Corp. L. J. 124, 39 Alb. L. J. 488. See the *S. A. McCaulley* (U. S. D. C.), 99 Fed. 302.

Exclusive jurisdiction of Federal Courts where a maritime lien exists by reason of maritime law, cannot be ousted by State statute declaring a lien in such cases. *Scatcherd Lumber Co. v. Pike*, 113 Ala. 555, 21 So. 136.

See further as to effect of State laws upon Federal jurisdiction the following cases: *Taylor v. Illinois Cent. R. Co.* (U. S. C. C.), 89 Fed. 119 (foreign corporation's compliance with State laws as to incorporation; conditions precedent to doing business; diverse citizenship; Federal Courts not deprived of jurisdiction); *Taylor v. Louisville & Nashville R. Co.* (U. S. C. C. A.), 88 Fed. 350, 31 C. C. A. 537, 60 U. S. App. 166 (Federal Courts not governed by State statute prohibiting injunction to restrain collection of illegal tax); *Eastern Building & L. Assn. v. Bedford* (U. S. C. C.), 88 Fed. 7 (noncompliance by corporation with State statute as to filing charter; when Federal Court may enforce contract to repay loan even though State Court might refuse to do so); *Duncan v. Atchison, Topeka & Santa Fe Rd. Co.* (U. S. C. C. A.), 72 Fed. 808, 19 C. C. A. 202, 44 U. S. App. 427 (jurisdiction of Federal Circuit Court of Appeals by writs of error on bills of exceptions is based upon and controlled by acts of Congress and practice and rules of Federal Courts regardless of State statutes or practice of State Courts); *Barling v. Bank of British North America* (U. S. C. C. A.), 50 Fed. 260, 7 U. S. App. 194 (conditions as to compliance by banking corporations with State statute, as prerequisites to suing in State Courts not binding on Federal Courts); *Bank of British North America v. Barling* (U. S. C. C.), 44 Fed. 641, 33 Am. & Eng. Corp. Cas. 53 (same point as last preceding case).

¹⁰ *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. 33.

Federal Constitution.¹¹ So consistently with the Constitution of the United States¹² a State may deny jurisdiction to the courts of the State over suits by a corporation of another State against a corporation of another State on a foreign judgment.¹³ And a State statute providing that no action can be maintained in the courts of the State for wrongful death occurring in another State except where deceased was a citizen of the State enacting said statute, the restriction operating equally upon representatives of the deceased whether they are citizens of such State or of other States, does not violate the privilege and immunity provision of the Federal Constitution.¹⁴

The highest court of a State may administer the common law according to its own understanding and interpretation thereof, being only amenable to review in the Federal Supreme Court where some immunity or privilege created by the Federal power has been asserted and denied.¹⁵

§ 200. Jurisdiction—Consent of Parties.

Consent of parties can never confer jurisdiction upon a Federal Court.¹⁶ And the consent of a State to be sued in its own courts by a creditor does not give that creditor a right to sue in a Federal Court.¹⁷ Where the State prescribes conditions under which a court may act litigants cannot dispense

¹¹ *Chambers v. Baltimore & Ohio Rd. Co.*, 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. 34, aff'g 73 Ohio St. 1, cited in *General Oil Co. v. Crane*, 209 U. S. 211, 224. See *St. Louis & Iron Mountain Ry. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. 616.

¹² Art. IV, § 1.

¹³ *Anglo-American Provision Co. v. Davis Provision Co.*, No. 1, 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. 92.

¹⁴ *Chambers v. Baltimore & Ohio Rd. Co.*, 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. 34, aff'g 73 Ohio St. 1.

¹⁵ *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. ed. 268, aff'g 202 Pa. 222, 51 Atl. 990.

¹⁶ *Thomas v. Board of Trustees of the Ohio State University*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. ed. 870; *Olds Wagon Works v. Benedict* (U. S. C. C. A.), 67 Fed. 1. See next following section, herein.

¹⁷ *Murray v. Wilson Distillery Co.*, 213 U. S. 151, 53 L. ed. 458, 29 Sup. Ct. 458, rev'g 161 Fed. 152, citing *Chandler v. Dix*, 194 U. S. 590, 48 L. ed. 1129, 24 Sup. Ct. 766.

with such conditions, for in such case the particular condition or status of the defendant is made a jurisdictional fact.¹⁸ A court cannot acquire jurisdiction by consent where the law conferring and limiting the court's jurisdiction does not confer it. And a complainant may be dismissed at the close of a trial for want of jurisdiction, even though the defendant corporation appears generally and answers and does not object to the want of jurisdiction.¹⁹

§ 201. Jurisdiction—Appearance—Consent—Waiver.

While a general appearance in the Circuit Court after removal may amount to a waiver of objection to the jurisdiction if some Circuit Court has jurisdiction of the cause, neither appearance nor consent can confer jurisdiction where no Circuit Court has jurisdiction of the controversy.²⁰ When a defendant

¹⁸ *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526 (appeal from judgment of General Term of the City Court of Brooklyn), citing *Risley v. Phoenix Bank*, 83 N. Y. 318, 337, 38 Am. St. Rep. 421; *Wheelock v. Lee*, 74 N. Y. 495; *Hoag v. Lamont*, 60 N. Y. 96.

¹⁹ *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526, cited in *Skinner v. Jordan*, 91 N. Y. Supp. 323, 46 Misc. 93 (to point that question of jurisdiction can be raised at any time); *Tyroler v. Gummersback*, 59 N. Y. Supp. 319, 321, 28 Misc. 161; *Colebrook, In re*, 55 N. Y. Supp. 861, 863, 26 Misc. 142 (to point that voluntary appearance of one not an inhabitant does not give jurisdiction); *Smith v. Crocker*, 43 N. Y. Supp. 427, 430, 14 App. Div. 250, 4 Ann. Cas. 81; *Gundlin v. Hamburg-American Packet Co.*, 28 N. Y. Supp. 572, 575, 8 Misc. 291, 296, 31 Abb. N. C. 437. It was also held in the principal case that a statute conferring jurisdiction upon a City Court in cases where any of the defendants shall reside or be personally served with summons within said city applied to natural persons and not to corporations.

²⁰ *Winn, In re*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. 515. A case of an application for a writ of mandamus to a District Judge acting as Circuit Judge. The petition was for a rule to show cause why mandamus should not issue commanding the judge to remand the case to the State Court. The petitioner, an assignee of the right of action of a shipper, brought in a State Court an action at law against an express company for the transportation of a boar whereby the animal was killed; citizenship of the plaintiff or his assignor was not alleged, but that of defendant was alleged as of another State. The court, per Mr. Justice Moody, said upon the point in the text: "A subordinate question must receive some attention. It is said that the petitioner in this case appeared generally in the Circuit Court after the removal of the case, and thereby waived his right to object to the jurisdic-

makes no appearance in the State Court or in the Circuit Court except for the purpose of raising the question of jurisdiction and removing the case to the Federal Court, such proceedings do not amount to a general appearance.²¹ Nonresident detention, and *In re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. 706, is cited in support of the position. But that case simply held that where there was a diversity of citizenship, which gave jurisdiction to some Circuit Court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits, and anything to the contrary said in *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. 150, was overruled, though the *Wisner* case was otherwise left untouched. See *Western Loan & Sav. Co. v. Butte & Boston Mining Co.*, 210 U. S. 368, 369, 52 L. ed. 1101, 28 Sup. Ct. 720. Here, however, is a case where, upon its face, no Circuit Court of the United States had jurisdiction of the controversy, originally or by removal. In such a case the consent of the parties cannot confer jurisdiction. *Louisville & Nashville R. R. v. Motley*, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. 42, and cases cited."

²¹ *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. 445.

As to effect of appearance, see the following cases:

United States: Davidson Marble Co. v. Gibson, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. 324 (holding that a defendant, having a statutory right to appear specially and object to the jurisdiction and the right to appeal to the Federal Supreme Court if the objection be overruled, cannot be compelled by a rule of court to waive the objection and appear generally; and that Rule 22 of the Circuit Court of the United States for the Ninth Circuit requiring a general appearance if the Circuit Court overrule such objection is inconsistent with § 918, Rev. Stat., and therefore invalid, as the jurisdiction of the Circuit Court is fixed by statute and a rule of court inconsistent with the statute is invalid); *Gunter v. Atlantic Coast Line Rd. Co.*, 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. 252 (suit against State officers to enjoin enforcing a tax; when appearance by attorney-general amounts to waiver by State of immunity from suit); *Wabash Western Ry. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. 126; *s. c.*, 65 Fed. 941, 13 C. C. A. 222 (want of jurisdiction; when petition for removal not considered like a general appearance as a waiver of objection to jurisdiction); *Interior Construction & Imp. Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. ed. 401 (jurisdiction of Circuit Court waived by general appearance); *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. 559 (petition for removal; foreign corporation; special appearance; nonwaiver of objection to jurisdiction); *Galveston, H. & S. Ry. Co. v. Gonzales*, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. 401 (special appearance; nonresidence; when State statute making an appearance a waiver not applicable to actions in United States Circuit Court under Rev. Stat., § 914); *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. ed. 98 (voluntary submission of corporation to jurisdiction of United States Circuit Court; stockholders and creditors bound by); *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L.

defendants appearing in the Circuit Court under protest for the sole purpose of denying jurisdiction do not waive the condition under the statute of 1875²² that any judgment of the court shall affect only property within the district.²³

ed. 699 (State statute making special appearance to challenge jurisdiction a general appearance so as to confer jurisdiction over the person not binding upon Federal Courts under Rev. Stat., § 914); *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829 (receiver's right to be sued in certain district is personal privilege which he may waive by appearing and answering); *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 35 L. ed. 332, 11 Sup. Ct. 691 (when a party who is ordered to appear in a pending suit in equity voluntarily appears, without service of process, and answers, setting up his claims, it is too late for him to object that there was error in the order); *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. ed. 608, 9 Ry. & Corp. L. J. 55 (voluntary appearance by nonresident without service upon him and pleading to merits makes him subject to a judgment against him); *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. 878 (railroad corporations; when voluntary appearance by State confers jurisdiction); *Commercial & Railroad Bank v. Slocomb*, 14 Pet. (39 U. S.) 60, 10 L. ed. 354 (corporations; appearance by attorney is proper); *Mecke v. Valley Town Mineral Co. (U. S. C. C.)*, 80 Fed. 114 (petition for removal to Federal Court not a general appearance); *Noonan v. Delaware, L. & W. R. Co. (U. S. C. C.)*, 68 Fed. 1 (objection that action brought in wrong district waived by general appearance and demand for service of papers); *Garner v. Second National Bk. (U. S. C. C.)*, 66 Fed. 369 (appearance in State Court for removal proceedings to Federal Court not a general appearance so as to preclude objection to jurisdiction); *Baltimore & Ohio Rd. Co. v. Ford (U. S. C. C.)*, 35 Fed. 170 (when appearance in State Court to make motions, after filing petition and bond for removal to United States Circuit Court does not give State Court jurisdiction).

Arkansas: *Arkansas Coal, G. F. C. & Mfg. Co. v. Haley*, 62 Ark. 144, 31 S. W. 545 (prosecution by corporation of appeal from order denying motion to quash service of summons gives jurisdiction).

Illinois: *Elting v. First National Bk.*, 173 Ill. 368, 50 N. E. 1095, aff'g 68 Ill. App. 204 (no jurisdiction given; entry of appearance by attorney).

Kansas: *Salina National Bk. v. Prescott*, 60 Kan. 400, 57 Pac. 121, 15 Am. & Eng. Corp. Cas. (N. S.) 696, rev'g 53 Pac. 769 (when papers in cause constitute voluntary appearance).

North Dakota: *William Deering & Co. v. Venne*, 7 N. Dak. 576, 75 N. W. 926 (when appearance by counsel constitutes a voluntary appearance and a waiver of defects in the summons or its service).

South Carolina: *Chafee v. Postal Teleg. Cable Co.*, 35 S. C. 372, 14 S. E. 764 (jurisdiction of person of foreign corporation given by general appearance).

²² Under § 8, of act of March 3, 1875, 18 Stat. 470.

²³ *Citizens' Savings & Trust Co. v. Illinois Central Rd. Co.*, 205 U. S. 46, 51 L. ed. 703, 27 Sup. Ct. 425.

§ 202. Waiver of Jurisdictional Defect as to Particular District.

Where at the time of removal to the Federal Court neither of the parties was a resident nor citizen of the district, that defect although being jurisdictional, being only as to the particular district, can be waived; and is waived if the parties make up the issues on the merits without objecting to the jurisdiction.²⁴

§ 203. Subsequent Change in Conditions After Jurisdiction of Circuit Court Has Attached.

The general rule is that when the jurisdiction of a Circuit Court of the United States has once attached it will not be ousted by subsequent change in the conditions.²⁵

²⁴ *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. 619, rev'g 152 Fed. 120, "This case is here upon a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. The action was originally brought to recover for injuries received by Eugene C. Kreigh, petitioner, hereinafter called the plaintiff, while engaged in the employ of the respondent, Westinghouse, Church, Kerr & Company, hereinafter called the defendant, superintending the construction of the brickwork in the erection of a brick and steel building for which the defendant was the contractor.

"The case was originally commenced in the District Court of Wyandotte County, Kansas. On the application of the defendant it was removed to the United States Circuit Court for the District of Kansas. In the petition for the allowance of the writ of certiorari a question was made as to the jurisdiction of the Federal Court, as it appears that at the time of the removal neither party was a resident nor citizen of the Federal district to which the case was removed, and neither of them a resident nor citizen of the State of Kansas. But it appears that no motion was made to remand for want of jurisdiction in the Federal Court, and no question as to the jurisdiction was made until the case came here. In that state of the record the defect as to the jurisdiction being simply as to the district to which the suit was removed, the parties being citizens of different States, the objection as to the jurisdiction might be, and, in our opinion, was waived by making up the issues on the merits without objection as to the jurisdiction of the court. It is unnecessary to enlarge upon this feature of the case, as it is controlled by the recent cases of *In re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. —; *Western Loan & Savings Co. v. Butte Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 706, 52 L. ed. 1101," per Mr. Justice Day.

²⁵ *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. 619. See *Lebenskeger v. Schofield*, 139 Fed. 384.

§ 204. Where Case Goes More Than Once to Highest State Court—Final Judgment—Writ of Error.

If a case goes more than once to the highest court of a State, the last judgment is the final one. Thus where the highest court of a State reverses an order of an inferior State Court removing a cause and remands the case to the State Court for trial, and after trial and verdict for plaintiff, the judgment is sustained by the highest court, the last judgment is the only final one to which the writ of error will run from the United States Supreme Court; the defendant cannot prosecute a writ of error to the judgment remanding the cause.²⁸

²⁸ *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. 430 (Mr. Justice McKenna, dissenting), citing *Schlosser v. Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. 654. In the principal case an action was brought by the defendant in error in a County Circuit Court of Kentucky against the Chesapeake & Ohio Ry. Co., a Virginia corporation, and the Maysville & Big Sandy Rd. Co. of Kentucky to recover damages for death caused by negligence, as alleged, of the Chesapeake & Ohio Ry. Co., in operating one of its trains over a railroad track, which had been leased to it by the other company. Thereafter the Chesapeake & Ohio Ry. Co. filed a petition for removal to the United States Circuit Court for the Eastern District of Kentucky. The petition was granted and the record was directed to be made up for transmission to said Federal Circuit Court. The plaintiff in the case excepted to the order and subsequently made a motion to set it aside, which was denied. An appeal from the order to the Court of Appeals was immediately granted and that court reversed the order and remanded the case for trial, 112 Ky. 186. The trial was had and the jury instructed by the court to find in favor of the defendant. This judgment was reversed by the Court of Appeals. 28 Ky. Law Rep. 536. Another trial was had resulting in a verdict for plaintiff in the sum of \$2,500. The judgment was sustained by the Court of Appeals, 30 Ky. Law Rep. 1009. To this judgment the writ of error in this case was taken. Instead of taking the case to the Federal Supreme Court the plaintiff proceeded in the State Court, and that court denied effect to the Federal judgment.

Writs of error to State Courts under § 709 of Revised Statutes of United States as amended:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or

A citizen of Alabama brought suit in an Alabama State Court against a citizen of Maryland and a citizen of Alabama, whereupon the Circuit Court for the Northern District of Alabama ordered the removal of the case on the petition of the citizen of Maryland alleging prejudice or local influence. A motion to remand was denied, and the case went to trial and judgment. That judgment was affirmed by the Circuit Court of Appeals and a writ of error from the Supreme Court was thereupon prosecuted. It was held that as the jurisdiction of the Circuit Court as exercised was dependent entirely on diversity of citizenship, the judgment of the Circuit Court of Appeals was final and the writ of error could not be maintained.²⁷

§ 205. Jurisdiction of Federal Circuit Courts Under Judiciary Act of 1888—Removal of Suits.

The Judiciary Act as amended in 1888 provides: "§ 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section,²⁸ which may now be pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the Circuit

immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ." U. S. Rev. Stat., § 709, as amended by act of February 18, 1875, chap. 80, 18 Stat. 318, U. S. Comp. Stat., 1901, p. 575. See also U. S. Rev. Stat., § 1003, U. S. Comp. Stat., 1901, p. 713, as to manner of issue of writs of error to State Courts. Examine as to appellate jurisdiction of Supreme Court, U. S. Comp. Stat. Supplement, 1907, p. 213. See extended note to said § 709, in 4 Fed. Stat. Ann., pp. 468 *et seq.*

²⁷ *Cochran & The Fidelity & Deposit Co. v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. ed. 178, 182.

²⁸ See § 161, herein.

Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being non-residents of that State; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district, any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court, or in any other State Court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State Court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State Court, to be proceeded with therein.

“At any time before the trial of any suit which is now pending in any Circuit Court or may hereafter be entered therein, and which has been removed to said court from a State Court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence,

he was unable to obtain justice in said State Court, the Circuit Court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State Court, it shall cause the same to be remanded thereto.

"Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed.²⁹

"§ 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State Court to the Circuit Court of the United States, he may make and file a petition in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept

²⁹ Act of August 13, 1888, chap. 866, § 2, 25 Stat. at L. 434, 435, U. S. Comp. Stat., 1908, p. 509, amending act of March 3, 1887, chap. 373, § 2, 24 Stat. at L. 552, amending act of March 3, 1875, chap. 137, § 2, 18 Stat. at L. 470.

such petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court; and if in any action commenced in a State Court the title of land be concerned, and the parties are citizens of the same State; and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the Circuit Court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.”³⁰

³⁰ Act of August 13, 1888, chap. 866, § 3, 25 Stat. at L. 435, 436, U. S. Comp. Stat., 1901, p. 510, amending act of March 3, 1887, chap. 373, § 3, 24 Stat. at L. 552, which amends act of March 3, 1875, 18 Stat. at L. 470.

Rev. Stat. U. S., § 640, providing for removal of suits commenced in any other than a Circuit or District Court of the United States against corporations other than a banking corporation organized under a law of the United States upon petition of the defendant stating that it had a defense arising under or by virtue of the Constitution or of any treaty or law of the United States was repealed by act of March 3, 1887, chap. 373, § 6, and by act of August 13, 1888, chap. 866, § 6. For construction of repealed statute see *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 463, 38 L. ed. 511,

§ 206. Removal of Suits—What Record Must Show.

A case cannot be removed from a State Court, as one arising under the Constitution or laws of the United States, unless the plaintiff's complaint, bill or declaration shows it to be a case of that character.³¹

A suit only arises under the Constitution and laws of the United States within the meaning of the Judiciary Act³² conferring jurisdiction on the Circuit Court when the plaintiff's statement of his own cause of action shows that it is based on those laws or that Constitution, and it is not enough that defendant may base his defense thereon.³³ And as a case cannot be removed on the ground that it is one arising under the

14 Sup. Ct. 654; *Texas & Pacific Ry. Co. v. Kirk*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. 1113; *Ames v. Kansas*, 111 U. S. 449, 459, 28 L. ed. 482, 4 Sup. Ct. 437; *Jones v. Oceanic Steam Navigation Co.*, 11 Blatchf. (U. S. C. C.) 406, 407; *Manufacturers' Nat. Bk. of Chicago v. Baack*, 8 Blatchf. (U. S. C. C.) 137.

³¹ *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598.

³² Section 1 of the act of August 13, 1888, chap. 866, 25 Stat. 433.

³³ *Winn, In re*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. 515; *Louisville & Nashville Rd. v. Mottley*, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. 42. The court, per Mr. Justice Moody (at pp. 464, 465), said: "The only ground of jurisdiction which is or can be suggested is that the suit was one arising under the Constitution and the laws of the United States, 25 Stat. 433, 434. It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. *Louisville & Nashville Railroad v. Mottley*, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. 42, and cases cited. If the defendant has any such defense to the plaintiff's claim it may be set up in the State Courts, and if properly set up and denied by the highest court of the State may ultimately be brought to this court for decision.

"Tested by these principles, the record, including the petition for removal, shows affirmatively that the case was not one arising under the laws of the United States. In substance, the allegations of the petition for removal are, that the defendant was subject to the Federal laws to regulate commerce, and that under those laws the defendant had a defense in whole or in part to the cause of action stated in the declaration. But the cause of action itself is not based upon the interstate commerce law or upon any other law of the United States."

Constitution, laws or treaties of the United States unless that appears by plaintiff's statement of his own claim, if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings, or by taking judicial notice of facts not relied on and regularly brought into controversy.³⁴

Although a defendant of the State Court may set up a defense based upon Federal rights which will, if denied, entitle him ultimately to have the decision reviewed by the Supreme Court, if the Federal question does not appear in the plaintiff's statement the case is not removable to the Circuit Court of the United States.³⁵ Again, the jurisdiction of the Circuit Court must appear affirmatively from distinct allegations, or facts clearly proven, and is not to be established argumentatively or by mere inference, and where jurisdiction depends upon diverse citizenship, absence of sufficient averments or of facts in the record showing such diversity is fatal and the defect cannot be waived by the parties.³⁶ If the plaintiffs are citizens of the State in which the action is brought and the defendant railway company is a citizen of another State, diverse citizenship is shown on the face of the record, authorizing on proper proceedings taken to bring it about, the removal of the action from the State Court to the Federal Court.³⁷

The right of a defendant jointly sued with others to remove the case into the Federal Court also depends upon the case made in the complaint against the defendants jointly, and that right, in the absence of showing a fraudulent joinder, does not arise from the failure of complainant to establish a joint cause of action.³⁸

³⁴ *Arkansas v. Kansas & T. Coal Co. & S. F. Ry. Co.*, 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. 47.

³⁵ *Winn, In re*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. 515.

³⁶ *Thomas v. Board of Trustees of the Ohio State University*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160.

³⁷ *Missouri, Kansas & T. Ry. Co. v. Missouri R. & W. Comm'rs*, 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. 18.

³⁸ *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. 161.

The Federal character of a suit must appear in the plaintiff's own statement of his claim, and where a defense has been interposed, the reply to which brings out matters of a Federal nature, those matters thus brought out by the plaintiff do not form a part of his cause of action.³⁹

In an action of tort, the cause of action is whatever the plaintiff declares it to be in his pleading, and matters of defense cannot be availed of as ground of removal.⁴⁰ If the record does not affirmatively show jurisdiction in the Circuit Court, the Federal Supreme Court must, upon its own motion, so declare, and make such order as will prevent the Circuit Court from exercising an authority not conferred upon it by statute.⁴¹

§ 207. No Cause Removable Unless It Is One of Which Circuit Courts Given Original Jurisdiction.

The test of the right to remove a case from a State Court into the Circuit Court of the United States under § 2 of the act of March 3, 1887, as corrected by the act of August 13, 1888, is that it must be a case over which the Circuit Court might have exercised original jurisdiction under § 1 of that act.⁴² And the rule is that no cause can be removed from the State Court to the Circuit Court of the United States unless it could have originally been brought in the latter court.⁴³ And if the

³⁹ *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. 545.

⁴⁰ *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 5 L. ed. 121, 21 Sup. Ct. 67.

⁴¹ *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. ed. 870.

⁴² *Arkansas v. Kansas & T. Coal Co. & S. F. Ry. Co.*, 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. 47.

⁴³ *Winn, In re*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. 515; *Dunn, Matter of*, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. 299; *Wisner, Ex parte*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. 150; *Madisonville Traction Co. v. Saint Bernard Min. Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 262; *Boston Mining Co. v. Montana Ore Co.*, 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. 434. In the principal case the court, per Mr. Justice Moody (at p. 463), said: "The petition for removal alleged that the plaintiff was a citizen of Missouri and the defendant 'a joint stock association organized under the laws of

suit as disclosed by the complaint could not have been brought originally in the Circuit Court then under the acts of 1887 and 1888, it should not be removed from the State Court and if removed it should be remanded.⁴⁴ Again, those suits only can be removed of which the Circuit Courts are given original jurisdiction, and the right of removal because of diversity of citizenship can only be exercised by a defendant who is a citizen, or by defendants who are citizens, of a State other than that in which the suit is pending.⁴⁵ A proceeding brought by a Kentucky railroad company in the County Court, under the statutes of that State,⁴⁶ to condemn lands for a public use, valued at over two thousand dollars, belonging to a corporation which is a citizen of another State, is a suit involving a controversy to which the judicial power of the United States extends within the meaning of the judiciary clauses of the Constitution, and of which the Circuit Court has original cognizance under the Judiciary Act of 1887;⁴⁷ and may be removed to the Circuit Court of the United States.⁴⁸ But where a suit is brought in plaintiff's State against a citizen of the same State and a citizen of another State it could not have

the State of New York,' but contained no allegation of the citizenship of the members of the association. It was agreed at the argument that the defendant was not a corporation but a joint stock association. Therefore the diversity of citizenship required to warrant a removal on that ground does not appear. The petition for removal" (printed in the margin of Vol. 213 U. S. 463 *et seq.*) "was not based upon diversity of citizenship but upon the ground that the suit was one arising under the laws of the United States. It is well settled that no cause can be removed from the State Court to the Circuit Court of the United States unless it could originally have been brought in the latter court. * * * The case could not have been brought originally in the Circuit Court of the United States and was therefore not removable thereto. In holding otherwise we think the learned Judge of the Circuit Court erred."

⁴⁴ *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. ed. 870. For statute see §§ 161, 204, 205 herein.

⁴⁵ *Cochran & The Fidelity & Deposit Co. v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. ed. 178, 182.

⁴⁶ *Ky. Stat.*, §§ 835-839.

⁴⁷ See §§ 161, 204, 205, herein.

⁴⁸ *Madisonville Traction Co. v. Saint Bernard Min. Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 262.

been brought originally in the Circuit Court and removal will not be properly granted.⁴⁹

§ 208. Federal Question or Right—When Court Has Jurisdiction—Instances.

When a statute of, or authority exercised under, a State is drawn in question, on the ground of its repugnancy to the Constitution of the United States, or a right is claimed under that instrument, the decision of the State Court in favor of the validity of such statute or authority, or adverse to the right so claimed, can be reviewed in the Federal Supreme Court.⁵⁰ The Federal Supreme Court has jurisdiction to review a judgment on a writ of error⁵¹ if the opinion of the highest court of the State clearly shows that the Federal question was assumed to be in issue, was decided adversely, and the decision was essential to the judgment rendered.⁵² Again, the Federal Supreme Court cannot decline jurisdiction when it is plain that the fair result of a decision of the State Court is to deny a constitutional right.⁵³ Where the opinion of the State Court shows that it considered and denied the validity of a statute of another State, and its binding force to control the right of action asserted, a Federal right specially set up is denied, and the Supreme Court has jurisdiction to review the judgment under § 709 of the Revised Statutes of the United States.⁵⁴

⁴⁹ *Cochran & The Fidelity & Deposit Co. v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. ed. 178, 182.

⁵⁰ *Home Ins. Co. v. Augusta*, 93 U. S. 116.

⁵¹ Under § 709, U. S. Rev. Stat., given in note to § 204, herein.

⁵² *Chambers v. Baltimore & Ohio Rd. Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143, aff'g 73 Ohio St. 1; original action was under State statute for damages for death caused by negligence of railroad corporation.

⁵³ *Smithsonian Institution v. St. John*, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. 601; *Rogers v. Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. 257.

⁵⁴ *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. 697, aff'g 99 S. W. 190, a case of writ of error to Court of Civil Appeals of Texas. Action was to recover for personal injuries sustained by defendant in error while employed as brakeman in the service of plaintiff.

For § 709, Rev. Stat., see note under § 204, herein.

Where the effect of the judgment of the State Court is to deny the defense that a statute of a Territory is a bar to the action a claim of Federal right is denied and the Supreme Court has jurisdiction under § 709 of the Revised Statutes.⁵⁶ Where in the State Court defendant distinctly claimed that a recovery would be prevented if full faith and credit were given to a judgment of the courts of another State, and this claim is expressly denied, the Supreme Court has jurisdiction to review under § 709, Rev. Stat.⁵⁶ Again, where the State Court denied the contention of plaintiff in error, defendant below, that a State statute as applied to transportation of an article from one State to another was in conflict with the commerce clause of the Constitution, a Federal question is involved and the Supreme Court has jurisdiction.⁵⁷ Where an act of a State legislature authorized the lease of such portion of water power as was not required by a State institution, and the question of legal title of the plaintiff to the lands in question was purely a local issue, and the question whether the erection of a steam plant by the defendant was an incident to its contract with the State institution are not reviewable on writ of error from the Federal Supreme Court to a State Court.⁵⁸ Where the bill of the trustee of bondholders of a water company, claiming an exclusive contract with a municipality, shows that an act of the legislature and an ordinance of the city have been passed under which the city shall construct its own waterworks, and that during the life of the contract the source of the ability of the water company to pay interest on, and principal of, its bonds will be cut off, a case is presented involving a constitutional

⁵⁶ *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. —, 30 Sup. Ct. —, aff'g 117 S. W. 426, and approving *Hyde v. Southern Ry. Co.*, 31 App. D. C. —.

For § 709, Rev. Stat., see note under § 204, herein.

⁵⁷ *American Express Co. v. Mullins*, 212 U. S. 311, 53 L. ed. 525, 29 Sup. Ct. 381. See § 204, note herein for § 709, Rev. Stat.

⁵⁸ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. 633; *Western Turf Assoc. v. Greenberg*, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. 384, 124 Ky. 182, reversed.

⁵⁹ *Columbia Water Power Co. v. Columbia Electric St. Ry. L. & P. Co.*, 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. 247, aff'g 43 S. C. 154, 20 S. E. 1002.

question, and irrespective of diverse citizenship, the Circuit Court of the United States has jurisdiction to determine the nature and validity of the original contract and whether the subsequent legislation and ordinance impaired its obligations within the meaning of the Federal Constitution.⁵⁹

A State cannot inflict a penalty for the nondelivery of a telegram within the limits of a place under the exclusive jurisdiction of the United States; and it is held that under the statute of Virginia in that regard the penalty cannot be collected for the nondelivery of a telegram to an addressee within the limits of the Norfolk Navy Yard. Congress alone can prescribe penalties in such a case. And where plaintiff in error, defendant below, in a suit for penalty under a State law asks and the court refuses an instruction that if the jury find that the default occurred within a navy yard, over which the United States had exclusive jurisdiction, the recovery could not be had under the State law, the Federal Supreme Court has jurisdiction to review the judgment.⁶⁰

⁵⁹ *Mercantile Trust Co. v. Columbus*, 203 U. S. 311, 27 Sup. Ct. 83, 51 L. ed. 198.

⁶⁰ *Western Union Teleg. Co. v. Chiles*, 214 U. S. 274, 53 L. ed. 994, 29 Sup. Ct. 613, reversing 107 Virginia, 60.

When Federal question exists and court has jurisdiction, see also the following cases: *Columbia Water Power Co. v. Columbia Electric St. Ry. L. & P. Co.*, 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. 247, aff'g 43 S. C. 154, 20 S. E. 1002 (impairment of obligation contract appeared); *Chicago, Burlington & Quincy R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. 513 (impairment of obligation of contract); *Central National Bk. v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. ed. 807 (Federal Court decree and effect of in State Court); *California Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 14 Bkg. L. J. 375 (writ of error; State Court; decision holding national bank liable as stockholder in savings bank); *Metropolitan Nat. Bk. v. Claggett*, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. 60, 6 Bkg. L. J. 24 (national bank; conversion of State bank); *Cates v. Producers & C. Oil Co. (U. S. C. C.)*, 96 Fed. 7 (quieting title to mining claim); *Chicago, Rock I. & P. R. Co. v. St. Joseph Union Depot Co. (U. S. C. C.)*, 92 Fed. 22 (whether State Court gives full faith and credit to Federal judgment); *San Joaquin & K. R. Canal & I. Co. v. Stanislaus County (U. S. C. C.)*, 90 Fed. 516 (fixing water rates too low); *Minnesota v. Duluth & Iron Range Rd. (U. S. C. C.)*, 87 Fed. 497 (resumption of lands granted railroad); *Florida C. & P. R. Co. v. Bell (U. S. C. C. A.)*, 87 Fed. 369, 31 C. C. A. 9, 59 U. S. App. 189 (action to recover railroad lands; construction of acts of

§ 209. Federal Question or Right—When Court no Jurisdiction—Instances.

Each State may, subject to restrictions of the Federal Constitution, determine the limit of the jurisdiction of its courts, and the decision of the highest court sustaining jurisdiction although the cause of action arose outside the border of the State is final and does not present a Federal question.⁶¹

Although it appears from plaintiff's statement of his claim that it cannot be maintained at all because inconsistent with the Constitution or laws of the United States, it does not follow that the case arises under that Constitution or those laws.⁶²

Where the validity of the local statute under which national bank shares are assessed was not drawn in question, but the only objection in the State Court was that the assessment was in excess of actual value, exorbitant, unjust and not in proportion with other like property, no Federal right was set up or denied and the Supreme Court has no jurisdiction to review the judgment under § 709, Revised Statutes.⁶³

Congress involved); *Nashville, C. & St. L. R. Co. v. Taylor* (U. S. C. C.), 86 Fed. 168 (bill against State board of equalizers for injunction; taxation of railroad property; discrimination under alleged unconstitutional law); *Consolidated Water Co. v. San Diego* (U. S. C. C.), 84 Fed. 369 (city ordinance fixing water rates); *Indianapolis Gas Co. v. Indianapolis* (U. S. C. C.), 82 Fed. 245 (action for relief against statute fixing rates for public service corporation); *Snohomish County v. Puget Sound Nat. Bk.* (U. S. C. C.), 81 Fed. 518 (suit to wind up affairs of insolvent national bank); *Crystal Springs Land & W. Co. v. Los Angeles* (U. S. C. C.), 76 Fed. 148 (contested title to water rights; State statute as to transferring property); *Rutter v. Shoshone Min. Co.* (U. S. C. C.), 75 Fed. 37 (adverse claim to application for patent to mine); *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* (U. S. C. C. A.), 68 Fed. 2 (deeds of land to railroad; violation of Federal grants); *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (U. S. C. C.), 37 Fed. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351 (enforcement of order of Interstate Commerce Commission).

⁶¹ *St. Louis & Iron Mountain Ry. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. 616.

⁶² *Arkansas v. Kansas & T. Coal Co. & S. F. Ry. Co.*, 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. 47.

⁶³ *First National Bank v. City Council of Estherville*, 215 U. S. 341, 54 L. ed. —, 30 Sup. Ct. —. Writ of error to review 136 Iowa, 203, dismissed.

For § 709, Rev. Stat., see note to § 204, herein.

Where the State Court decides that, under the law of the State the constitutionality whereof is not attacked, the action of defendant in giving replevy bond and answering amounted to a general appearance and waiver of objection to jurisdiction based on a Federal ground, the ruling of general appearance rests on a nonFederal ground sufficient to sustain it and cannot be reviewed by the Supreme Court. And where plaintiff in error did not set up in the State Court the contention that the contract of interstate shipment should be construed according to the act of Congress regulating interstate shipments instead of by the law of the State where made, but on the contrary, contended that it should be construed by the law of the State of destination and trial of the case, the record presents no Federal question properly set up in the court below that can be considered by the Supreme Court.⁶⁴ A suit brought by shippers to enjoin a railroad company from putting a tariff schedule into effect on the ground that it violates rights secured by the act to regulate commerce is a case arising under the Constitution and laws of the United States, and the jurisdiction of the Circuit Court over the person of the defendant must be determined accordingly. And under the jurisdictional act⁶⁵ the Circuit Court in the district of which the defendant is not an inhabitant has not jurisdiction of a case arising under the Constitution and laws of the United States, even though diverse citizenship exist, the plaintiff resides in the district, and the cause be one alone cognizable in a Federal Court.⁶⁶ A writ of

⁶⁴ *Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Slade*, 216 U. S. 78, 54 L. ed. —, 30 Sup. Ct. —. Writ of error to review 3 Ga. App. 400, dismissed.

⁶⁵ Act of March 3, 1875, chap. 137, 18 Stat. 470, as amended by the act of March 3, 1887, chap. 373, 24 Stat. 552, U. S. Comp. Stat., 1901, p. 508, corrected by act of August 13, 1888, chap. 866, 25 Stat. 433, U. S. Comp. Stat., 1901, p. 508, noted under § 161, herein.

⁶⁶ *Macon Grocery Co. v. Atlantic Coast Line Rd. Co.*, 215 U. S. 501, 54 L. ed. —, 30 Sup. Ct. —, aff'g 166 Fed. 166. Mr. Justice Harlan dissented. The court, per Mr. Justice White (at p. 507), said: "In cases of the character of the one at bar the rulings of the lower Federal Courts have uniformly been to the effect that they arose under the Constitution and laws of the United States. *Tift v. Southern Railway Co.*, 123 Fed. 789, 793; *Northern*

error will be dismissed for want of jurisdiction where there is a nonFederal ground on which the judgment rested sufficient to sustain it without regard to the Federal question.⁶⁷

Although the State Court may incorrectly charge as to certain provisions of a statute if the jury finds that defendant has violated those provisions and also other provisions not involving any Federal question, and only one penalty is assessed, the judgment rests on a nonFederal ground sufficient to sustain it, and the Supreme Court has not jurisdiction to review it under § 709, Revised Statutes.⁶⁸

When a State Court decides a case upon a nonFederal ground

Pacific Ry. Co. v. Pacific, etc., Assn., 165 Fed. 1; *Memphis Cotton Oil Co. v. Illinois Central R. R. Co.*, 164 Fed. 290, 292; *Imperial Colliery Co. v. Chesapeake & O. Ry. Co.*, 171 Fed. 589. And see *Sunderland Bros. v. Chicago, R. I. & P. Ry. Co.*, 158 Fed. 877; *Jewett Bros. v. C., M. & St. P. Ry. Co.*, 156 Fed. 160. We are of opinion that the case before us may properly be said to be one arising under a law or laws of the United States. As said by Taft, Circuit Judge, in *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. et al.*, 54 Fed. 730:

"It is immaterial what rights the complainant would have had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of Federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

"The object of the bill was to enjoin alleged unreasonable rates, threatened to be exacted by carriers subject to the act to regulate commerce. The right to be exempt from such unlawful exactions is one protected by the act in question, and the purpose to avail of the benefit of that act, as well as of the anti-trust act, is plainly indicated by the averments of the bill. Of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce was essentially involved.

"The jurisdiction of the Circuit Court not being invoked solely upon the ground of diversity of citizenship, it inevitably follows that, as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of the persons of the defendants. In *re Keasby & Mattison Co.*, 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. 273; In *re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. 706; *Western Loan & Sav. Co. v. Butte & Boston Min. Co.*, 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. 720."

⁶⁷ *St. Louis Southwestern Ry. Co. v. Tyler*, 212 U. S. 552, 29 Sup. Ct. 684, 53 L. ed. 649, writ of error to review 99 Tex. 491, dismissed.

⁶⁸ *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. 220.

which is sufficient to maintain the decision the Supreme Court will not review the judgment.⁶⁹

The denial by the State Court to give to a Federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the United States and prevents a Federal question reviewable by the Supreme Court under § 709, of the Revised Statutes.⁷⁰

⁶⁹ *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. 220.

⁷⁰ *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. 616.

As to nonFederal question and nonjurisdiction of court, see also the following cases: *Telluride Power Transmission Co. v. Rio Grande Western Ry. Co.*, 175 U. S. 639, 20 Sup. Ct. 245, 44 L. ed. 305, dismissing appeal, 16 Utah, 125, 51 Pac. 146 (questions of fact and local law; mining water rights; jurisdiction on writ of error does not extend to); *Allen v. Southern Pac. Rd. Co.*, 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. 518, dismissing writ of error in 112 Cal. 455, 44 Pac. 796 (case decided by State Court wholly independent of Federal question set up, and adequately sustained independent of such nonFederal question); *Capital National Bk., Lincoln, v. First Nat. Bk., Cadiz*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. 202, dismissing writ of error in 49 Neb. 795, 69 N. W. 1151 (allegation of organization of national bank under Banking Act and appointment of receiver who took possession as trustee and these averments were admitted but there was a failure to claim rights under Federal laws); *Pierce v. Somerset Ry. Co.*, 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. 64 (error to State Court; judgment based on distinct grounds; decision of one question sufficient notwithstanding Federal question, to sustain judgment; Supreme Court will not review); *Galveston, H. & S. A. Ry. Co. v. Texas*, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. ed. 1017 (State Constitution prohibiting land grants enforced against railroad company involves no infraction of Federal Constitution); *St. Louis, C. G. & Ft. Smith R. Co. v. Merriam*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. 443 (writ of prohibition directed to State Court and to railroad receiver, directing him to turn over property to another receiver presents no Federal question); *St. Paul, M. & M. Ry. Co. v. Todd County*, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. 281 (exemption from taxation; railroads; obligation of contract; not subject to review on error); *Peabody Gold Min. Co. v. Gold Hill Min. Co.* (U. S. C. C.), 97 Fed. 657 (trespass upon mining claim); *California Oil & Gas Co. v. Miller* (U. S. C. C.), 96 Fed. 12 (suit to quiet title; question of fact and not construction of law of United States); *Murray v. Chicago & N. W. R. Co.* (U. S. C. C. A.), 92 Fed. 868, 35 C. C. A. 62, 13 Am. & Eng. Rd. Cas. (N. S.) 278, aff'g 62 Fed. 24 (constitutional question not raised; interstate transportation charges; common as affecting); *Montana Ore Purchasing Co. v. Boston & M. C. C. & S. Min. Co.* (U. S. C. C. A.), 85 Fed.

§ 210. Presentment of Federal Question—Record.

In order to give the United States Supreme Court jurisdiction, under § 709⁷¹ of the Revised Statutes, not only must a right under the Constitution of the United States be specially set up, but it must appear that the right was denied in fact or that the judgment could not have been rendered without denying it. When the constitutional right was not set up in the original plea, and the record does not disclose the reasons of the State Court for refusing to allow a new plea setting up the constitutional right, and the record shows that the refusal might have been sufficiently based on nonFederal grounds, the Supreme Court of the United States cannot review the judgment under the above section of the Revised Statutes, and when it does not appear in the record that a telegraph message between two points in the same State had to be transmitted partly through another State, except by a plea which the State Court refused, on nonFederal grounds, to allow to be filed, no Federal question is involved and said Supreme Court cannot review the judgment under § 709 of the Revised Statutes.⁷²

§ 211. Removal of Suits—Corporation Created by Congress—Constitution and Laws of United States—Separable Controversy.

A suit brought in a State Court against a corporation organized under an act of Congress may be removed to a Federal Court.⁷³ As a corporation created by act of Congress derives all its rights from the law creating it, suits brought against it, on account of its action, arise under the Constitution and laws of the United States and are removable into the Federal

867, 29 C. C. A. 462, 57 U. S. App. 13 (mining claim; right to follow vein; question of fact); *Crystal Springs Land & Water Co. v. Los Angeles* (U. S. C. C.), 82 Fed. 114 (quieting title; averment that certain State statutes so attempt to transfer title defeated by denial).

⁷¹ Given in note under § 204, herein.

⁷² *Western Union Teleg. Co. v. Wilson*, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. 403.

⁷³ *Supreme Lodge Knights of P. v. Hill* (U. S. C. C. A.), 76 Fed. 468, 22 C. C. A. 280, 42 U. S. App. 200, 5 Am. & Eng. Corp. Cas. (N. S.) 157.

Courts.⁷⁴ Where the Circuit Court has jurisdiction by reason of the fact that the defendant is a corporation created by an act of Congress the joinder of other defendants, citizens of plaintiff's State, does not prevent removal to the Circuit Court if there is no separable controversy and all the defendants unite in the petition; the Federal character permeates the entire case and affects all parties defendant.⁷⁵

§ 212. Removal of Suits—Corporations Created by Congress—National Banks.

Neither a national bank nor its receiver can remove a suit into the Federal Court since the act of 1887⁷⁶ on the ground that it is a Federal corporation.⁷⁷

§ 213. Removal of Suits—Separable Controversy—Joint Action.

In determining whether a case may be removed by one defendant the question is not what the rule of the Federal Court may be as to whether or not the action is joint, but whether the controversy is one made removable by Congress in § 2 of the acts of March 3, 1887, and August 13, 1888.⁷⁸

In an action brought in a State Court by citizens of one State against two corporations, citizens of another State, and the

⁷⁴ *Dunn, Matter of*, 212 U. S. 374, 53 L. ed. 553, 29 Sup. Ct. 299 (holding also that the Federal Supreme Court will judicially notice that a defendant corporation was incorporated by act of Congress); *Osborn v. Bank of United States*, 9 Wheat. (22 U. S.) 738, 6 L. ed. 204.

⁷⁵ *Dunn, Matter of*, 212 U. S. 374, 53 L. ed. 553, 29 Sup. Ct. 299, holding also that the application of § 10 of the act of March 11, 1902, 32 Stat. 68, chap. 183, is not limited to local actions described in § 8 of act of March 3, 1875, chap. 137, 18 Stat. 470.

⁷⁶ Act of March 3, 1887.

⁷⁷ *Wichita National Bk. v. Smith* (U. S. C. C. A.), 72 Fed. 568, 36 U. S. App. 530, 19 C. C. A. 42, cited in *Miller v. LeMars Nat. Bank* (U. S. C. C.) 116 Fed. 551, 553. Examine *Continental Nat. Bank v. Buford*, 191 U. S. 119, 123, 124, 48 L. ed. 119, 24 Sup. Ct. 54; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. 325, per Mr. Chief Justice Fuller. See also note in Fed Stat. Annot. pp. 193 *et seq.*; Act of Aug. 13, 1888.

⁷⁸ *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. 161.

directors thereof, some of whom are citizens of the same State as the plaintiff, for the purpose of setting aside a conveyance made by one defendant corporation to the other, the action may be severable as to the conveying corporation; and if it is so, and as to the cause of action alleged against it, its directors are not necessary parties, it may remove the action as to it into the Circuit Court of the United States.⁷⁹ Where plaintiff in good faith insists on the joint liability of all defendants until the close of the trial, the dismissal of the complaint on the merits as to the defendants who are citizens of plaintiff's State does not operate to make the cause then removable as to non-resident defendants and to prevent the plaintiff from taking a verdict against the defendants who might have removed the cause had they been sued alone, or if there had originally been a separable controversy as to them.⁸⁰

§ 214. Removal of Suits—Separable Controversy Joint Action—Torts—Diversity of Citizenship.

A railroad corporation sued jointly with its servant for negligence of the latter for which the former is responsible, may not remove the case into the Federal Court unless diversity of citizenship also exists as to the other defendants.⁸¹

A railroad corporation may be jointly sued with the engineer

⁷⁹ *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. 575.

⁸⁰ *Lathrop, Shea & Henwood Co. v. Interior Construction & Imp. Co.*, 215 U. S. 246, 53 L. ed. —, 29 Sup. Ct. —. The action in this case was against defendant and a railroad company to recover upon a contract by plaintiff with the construction company and for the materials and use of certain articles by the railroad. Among other matters it was averred that the construction company was the agent and representative of the railroad company, and that the latter became and was responsible and liable for the acts and obligations of the construction company. The performance by plaintiff of the contract was alleged. It was also averred that the railroad company was a New York corporation and the construction company a New Jersey corporation. The case was held to be removable into the Federal Court and the Supreme Court affirmed the judgment of the Circuit Court.

⁸¹ *Union Pacific R. Co. v. T. P. Ry. Co. v. West. Ry. Co.*, 220 U. S. 441, 51 Sup. Ct. 104. See also *Union Pacific R. Co. v. T. P. Ry. Co.*, 220 U. S. 441, 51 Sup. Ct. 104.

and conductor of one of its trains when it is sought to make the corporation liable only by reason of their negligence, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence. Such a suit is not removable by the corporation, as a separable controversy, even though the amount involved exceed two thousand dollars, exclusive of interests and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, if the citizenship of the individual defendants sued with the company as joint tort feorsors is identical with that of the plaintiff.⁵²

A State has the right by its Constitution and laws to regulate actions for negligence; and where it provides, as has been done by § 241 of the Constitution and § 6 of the statutes of Kentucky, that a plaintiff may proceed jointly or severally against those liable for the injury, nothing in the Federal removal statute converts such an action into a separable controversy for the purposes of removal, because of the presence of a non-resident defendant therein properly joined under the law of the State wherein it is conducting operations and is duly served with process.⁵³

The following case was an ordinary action, under a State statute, for wrongfully causing the death of plaintiff's intestate, in which no Federal question was presented by the pleadings, or litigated at the trial, and in which the liability depended upon principles of general law, and not in any way upon the terms of the order appointing receivers; and whatever the rights of the receivers might have been to remove the cause if they had been sued alone, the controversy was held not a separable controversy within the intent and meaning of the act of March 3, 1887, as corrected by the act of August 13, 1888, and this being so, the case came solely within the first clause of the

⁵² *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. 161.

⁵³ *Cincinnati, N. O. & T. P. Ry. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 48, 26 Sup. Ct. 166.

section, and it was not intended by Congress that, under such circumstances, there should be any difference between the rule applied under the first and second clauses of the act.⁸⁴ When one of several defendants in a suit on a joint cause of action in a State Court loses his right to remove the action into a Circuit Court of the United States by failing to make the application in time, the right is lost as to all.⁸⁵

§ 215. Removal of Suits—Separable Controversy—Joint Action—Fraudulent Joinder.

While an action commenced in a State Court against two defendants, one of whom is a resident and the other a nonresident, may be removed to the Circuit Court of the United States by the nonresident defendant if it can be shown that the cause of action is separable and the resident is joined fraudulently for the purpose of preventing the removal of the cause to the Federal Court, such removal cannot be had if it does not appear that the resident defendant is fraudulently joined for such purpose. This rule will be adhered to even if on the trial of the action the lower court holds that no evidence was given by the plaintiff tending to show liability of the resident defendant, and a second application for removal from the State to the Federal Court has been made and denied after a trial, and the trial court has sustained a demurrer to the evidence as to the resident defendant, and where it appears that the ruling was on the merits and *in invitum*.⁸⁶

⁸⁴ Chicago, R. & P. Ry. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1053, 20 Sup. Ct. 854.

⁸⁵ Fletcher v. Hamlet, 116 U. S. 408, 29 L. ed. 679, 6 Sup. Ct. 426.

⁸⁶ Kansas City Suburban Belt & Ry. Co. v. Herman, 187 U. S. 63, 23 Sup. Ct. 24, 47 L. ed. 76; Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. 248; Powers v. Chesapeake & Ohio Railway Co., 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. 264.

In Illinois Central Rd. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. —, 30 Sup. Ct. —, the court, per Mr. Justice Holmes, said: "Of course if it appears that the joinder was fraudulent as alleged, it will not be allowed to prevent the removal. Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. 184. And further there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and there-

§ 216. Removal of Suits—Separable Controversy—Joint Action—What Record Must Show.

Where the right of removal depends upon the existence of a separable controversy, the question is to be determined by the condition of the record in the State Court at the time of the filing of the petition to remove. When concurrent negligence is charged, the controversy is not separable, and as the complaint in this case, reasonably construed, charged concurrent negligence, the court declined to hold that the State Courts erred in retaining jurisdiction.⁸⁷ Again, whether or not a cause presents a separable controversy which authorizes a removal from a State Court to a Circuit Court of the United States is to be determined by the plaintiff's own statement, made in good faith in the petition filed by him in the State Court, of his cause of action against the defendants. The plaintiff has the right to prosecute his action to final determination in his own way, and if in his petition he states in good faith a joint cause of action against two or more defendants, it is not open to either or both or all of them by answering separately or pleading separate defenses to make that a several suit or ac-

fore must be taken to be true when they fail to be considered in the State Courts. *Crehore v. Ohio & Mississippi Ry. Co.*, 131 U. S. 240, 244, 33 L. ed. 144, 9 Sup. Ct. 692; *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. 430. On the other hand, the mere epithet fraudulent in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. 161; *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. 166. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged wrongdoer, the Illinois Central Railroad itself, was fraudulent and false." *Illinois Central Ry. Co. v. Sheegog*, 215 U. S. 308, 316, 54 L. ed. —, 30 Sup. Ct. —.

⁸⁷ *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 5 L. ed. 121, 21 Sup. Ct. 67.

tion which the plaintiff has elected to make joint. But, if the plaintiff fails to state any cause of action against one of the defendants, the presence of that defendant as a party to the suit may be disregarded in determining the right of removal.⁸⁸

§ 217. Denial of Petition for Removal—Petitioners' Right to Elect Remedy.

While a petitioner, if the State Court denies his petition for a removal, may remain in that court and take the case to the Federal Supreme Court for review on a writ of error after final judgment, he is not obliged so to do, but may file the record in the Circuit Court, and that court has jurisdiction to determine the question of removability, and, notwithstanding § 720 of the Revised Statutes, it may protect its jurisdiction by injunction against further proceedings in the State Court.⁸⁹

§ 218. Removal of Suit Denied in State Court—Filing

⁸⁸ *Reinartson v. Chicago Great Western Ry. Co.* (U. S. C. C.), 174 Fed. 707, 709, 710, citing as settling the above points: *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. ed. 441. Compare *Illinois Central Rd. Co. v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. —, 54 L. ed. —.

⁸⁹ *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. 430. The court, per Mr. Justice Day, said: "It is not necessary to determine whether the case was removable or not. The Federal Court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this court. Instead of bringing the case here the plaintiff proceeded in the State Court, and that court denied effect to the Federal judgment. The plaintiff in error lost no right when thus compelled to remain in the State Court, notwithstanding the Federal judgment in his favor, and brought the suit here by writ of error to the final judgment of the State Court, denying the right secured by the Federal judgment. It was open to the plaintiff to bring the adverse decision of the Federal Court on the question of jurisdiction to this court for review. This course was not pursued, but the action proceeded in the State Court evidently upon the theory that the judgment of the Federal Court was a nullity if it had erred in taking jurisdiction. For the reasons stated we think this hypothesis is not maintainable. The judgment of the Court of Appeals of Kentucky is reversed and the cause is remanded for further proceedings not inconsistent with this opinion," Mr. Justice McKenna dissenting. For statement of facts in this case see note 26 to § 204, herein.

Answer and Record—Asserting Affirmative Remedy and Denial of Jurisdiction.

The fact that defendant, after refusal of the State Court to grant the order of removal, filed an answer, is held not to affect its right to file the record in the Circuit Court and obtain an order of removal before the time for filing the answer as extended had expired.⁹⁰

Even though a defendant's petition to remove is wrongfully denied by the State Court, and in his answer he protests against the right of the State Court to retain jurisdiction, if he asserts an affirmative remedy in the State Court, in which he brought in a third party for liability over, he submits his whole case and cannot attack the action of the State Court in denying his petition for removal in the Federal Supreme Court on writ of error.⁹¹

⁹⁰ *Avent v. Deep River Lumber Co.* (U. S. C. C.), 174 Fed. 298, citing *Dillon on Removal*, § 156; *Wilcox & Gibbes Guano Co. v. Phoenix Ins. Co.* (U. S. C. C.), 60 Fed. 929 ["whatever may have been held in other circuits, and whatever may be the strength of the reasons upon which the decisions to the contrary are based, the Wilcox case has been uniformly followed in this circuit, and, in the absence of any decision by the Supreme Court of the United States, is controlling authority. The opinion of Judge Simon-ton" (in the Wilcox case, who examines the decisions of the Federal Courts in the several circuits and concludes that the correct rule is that stated by Judge Dillon) "is well considered and sustained by reason. It is followed in the Second Circuit. *Lord v. Lehigh Valley Rd. Co.* (U. S. C. C.), 104 Fed. 929," per Connor, Dist. J.].

As to filing answer attacking facts on which the right to remove, etc., depends, and determining issue in Federal Court, see *Phillips v. Western Terra Cotta Co.* (U. S. C. C.), 174 Fed. 873.

⁹¹ *Texas & Pacific Ry. Co. v. Eastin & Knox*, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. 564, aff'g 100 Tex. 556 (this was an action against a railroad corporation and its agents for wrongfully billing and shipping cattle over one road when requested to ship over another resulting in injury and damage to the cattle). In this case Mr. Justice McKenna said: "The assignments of error present the question of the right of the Texas and Pacific Company to a removal of the case to the Circuit Court of the United States, (1) Because, being a corporation chartered under an act of Congress, the suit was one arising under the laws of the United States, and that this character was not taken from it by joining a local defendant when it was an action to establish a joint liability. (2) Where the facts stated in the petition for removal show a cause properly removable from a State to a Federal Court, the State Court has no jurisdiction to pass finally upon them; that

The right of a defendant who has petitioned for removal of a case to the Federal Court cannot be extended beyond what is necessary to defend the case; he cannot deny the jurisdiction after invoking it for affirmative relief.⁹²

§ 219. Federal Circuit Court May Determine Removability of Cause and Protect Such Jurisdiction—Injunction.

The United States Circuit Court has jurisdiction to determine for itself the removability of a cause and may take jurisdiction thereof and protect such jurisdiction even though the State Court refuse to make the removal order.⁹³ So after the presentation of a sufficient petition and bond to the State Court in a removable case, it is competent for the Circuit Court, by a proceeding ancillary in its nature, without violating the Federal statute⁹⁴ forbidding a court of the United States from enjoining proceedings in a State Court, to restrain the party right is one for the Federal Court, it having the exclusive province of passing upon such questions of fact.

"The first proposition is sustained in the *Matter of Dunn*, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. 299; the second proposition is sustained in *Chesapeake & Ohio Railway v. Emma R. McCabe, Administratrix*, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. 430. The latter case also decides that if an application for removal be denied the petitioner loses no right by being compelled to stay in the State Court. In other words, that the petitioner may stay in the State Court and defend the action against him, and if the judgment go against him bring the case to this court and have the question of removal determined. But plaintiffs in error did not defend only against the cause of action. They instituted a cause of action against the St. Louis & San Francisco Railroad Company, in which the defendant in error had no concern, and recovered a judgment against that company in the sum of \$1,800. By doing so they invoked the jurisdiction of the State Court in their own account and for their own purpose, and the case is brought within the ruling in *Merchants' Heat & L. Co. v. Clow & Lens*, 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. 285."

⁹² *Texas & Pacific Ry. Co. v. Eastin & Knox*, 214 U. S. 153, 54 L. ed. 946, 30 Sup. Ct. 564, aff'g 100 Tex. 556.

⁹³ *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. ed. 765.

When the Federal Supreme Court is called upon to exercise its own judgment it will not be controlled by decisions of State Courts. *Dunn, Matter of*, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. 299; *Cochran & The Fidelity & Deposit Co. v. Montgomery*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. ed. 178, 182.

⁹⁴ Rev. Stat., § 720.

against whom a case has been legally removed from taking further steps in the State Courts.⁹⁵ Where a petition for removal is denied and the petitioner files the record in the Circuit Court and that court determines for itself the question of removability and protects its jurisdiction by injunction against further proceedings in the State Court, the judgment rendered by the Circuit Court under such conditions is not void, even if jurisdiction be improperly assumed and retained, as the jurisdictional question can be reviewed by the Federal Supreme Court, and until reversed it is binding on the State Court and cannot be treated as a nullity.⁹⁶ Where the State Court refuses to remove a cause to the Circuit Court and afterwards on filing the record in the Circuit Court that court remands the cause to the State Court, if there was any error in the ruling of the State Court it becomes wholly immaterial.⁹⁷

§ 220. Effect Upon Jurisdiction of State Court of Removal of Cause.

When the proper petition for removal accompanied by a sufficient bond is filed, the petitioner is entitled to an order for removal, and the jurisdiction of the State Court then ceases except for the purpose of passing on and making an order for removal.⁹⁸ And when the petitioner presents to the State Court

⁹⁵ *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 262.

Injunction not granted to stay proceedings in State Courts, except, etc., "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." U. S. Rev. Stat., § 720, U. S. Comp. Stat., 1901, p. 581, Act of March 2, 1793, chap. 22, § 5, 1 Stat. 334.

⁹⁶ *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. ed. 564, citing *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. 611. For statement of the facts in the principal case, see note to that case in § 204, herein.

⁹⁷ *Telluride Power Trans. Co. v. Rio Grande Western Ry. Co.*, 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. 178.

⁹⁸ *Phillips v. Western Terra Cotta Co.* (U. S. C. C.), 174 Fed. 873. The court, per Phillips, Dist. J., at pp. 875, 876, said: "The Supreme Court, with reiteration, has held that when the defendant presents to the State Court his petition for removal, accompanied with the required bond, praying for removal of cause into the Federal Court, if the petition on its face shows

a sufficient cause for removal it is the duty of that court to proceed no further in the suit. The jurisdiction of the Circuit Court then attaches.⁹⁹ In other words, it is settled as to re-

the facts essential to entitle the defendant to such removal, the only question left for decision by the State court is whether or not, taking the record then before it, the order should be made. If the petition be sufficient and the bond be given, *eo instante* every other jurisdiction of the State Court ceases, and that of the Federal Court attaches over the parties and subject-matter. 'The State Court is only at liberty to inquire whether, on the face of the record (i. e., the petition of the plaintiff and the petition for removal) a case had been made which requires it to proceed no further. * * *

With that fact established, the necessary citizenship for a removal existed. Whether it was a fact or not could only be tried in the Circuit Court.' *Carson v. Hyatt*, 118 U. S. 287, 6 Sup. Ct. 1054, 30 L. ed. 167. 'Upon the filing of the petition and bond, the suit being removable under the statute, the jurisdiction of the State Court absolutely ceased, and that of the Circuit Court of the United States immediately attached. The duty of the State Court was to proceed no further in the cause. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored.' *Steamship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. 60, 27 L. ed. 87; *Crehore v. Ohio & Mississippi Ry. Co.*, 131 U. S. 244, 9 Sup. Ct. 692, 33 L. ed. 144; *Stone v. South Carolina*, 117 U. S. 432, 6 Sup. Ct. 799, 29 L. ed. 962. So Judge Sanborn, in *Boatmen's Bank v. Fritzlein*, 135 Fed. 653, 68 C. C. A. 291, said: 'When a petition for removal and the bond required by the act of Congress are filed, and the record on its face shows the right of the petitioner to a removal, the jurisdiction of the State Court ceases, and that of the Federal Court attaches. If issues of fact arise upon the averments of the petition for removal, the jurisdiction to try them is in the Federal Court, and not in the State Court.' In *Donovan v. Wells, Fargo & Co.* (U. S. C. C. A.), 169 Fed. 363, the court again said: 'On the filing of a removal petition, it becomes a part of the record, and if, on the face of the record as so constituted, the suit appears to be a removable one, the State Court is bound to surrender jurisdiction.' The inevitable corollary is that no other pleadings, no other issues, are permissible in the State Court after the sufficient petition and bond are presented for removal." In this case the petition of the plaintiff in the State Court was silent as to the citizenship of the parties. The petition of the defendant for removal, supported by affidavit, and accompanied with sufficient bond, alleged that at the time of bringing suit, and since, the plaintiff was a citizen of the State of Kansas, and the defendant was a citizen of the State of Missouri. When the transcript was filed in the Circuit Court, the record proper on its face showed the requisite jurisdictional facts to authorize the Circuit Court to proceed to judgment. In this state of the record the plaintiff filed a motion to remand and filed a motion to set aside the order overruling the motion to remand the cause to the State Court and for rehearing, which was denied.

⁹⁹ *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643.

A defendant's right to remove to the Federal Court is amply protected.

§ 223. Powers of Corporations Generally.

In the United States a corporation can only have an existence under the express laws of the State by which it is created and can exert no power or authority which is not granted to it by the charter under which it exists or by some other legislative act. If a corporation is organized through articles of association entered into under general laws, the memorandum of association stands in the place of a legislative charter in so far that its powers cannot exceed those enumerated therein, but powers enumerated and claimed therein which are not warranted by statute are void for want of authority.¹

A corporation has only such power as is conferred upon it expressly or by implication to enable it to carry out the objects of its creation.²

Again, the powers of a corporation are, strictly speaking, twofold: those that are derived from express grant, and those that are incident and necessarily appertain to it, whether expressed in the grant or not. In modern times, it has been usual to embrace all these incidental powers in the act of incorporation, so that it may now be considered a general rule, that the powers of a corporation are regulated and defined by the act which gives it existence. A corporation is strictly limited to the exercise of the powers specifically conferred upon it; and the exercise of the corporate franchise cannot be extended beyond the letter and spirit of the act of incorporation.³

In brief, corporations can possess and exercise only those powers which are expressly conferred or which are necessarily implied, essential to the exercise of those expressly granted, incidental and necessary to carry into effect the purposes for which it was created. Powers incidental or supplemental to

¹ Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409, 5 Rd. & Corp. L. J. 364.

² Bankers' Union v. Crawford, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465.

³ Leggett v. New Jersey Manufacturing & Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

the very existence of the corporation are such as are best calculated to effect the object for which they were granted; they should be directly and immediately appropriate to the execution of the specific powers and not merely those which sustain only a slight, indirect or remote relation to the specific purposes of the corporation.⁴

⁴ *United States*: *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 12 Sup. Ct. 403 ("a corporation being the mere creature of the legislature, its rights, powers and privileges are dependent solely upon the terms of its charter." *Id.*, 312, per Mr. Justice Field, a case of taxation of corporate franchises); *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. ed. 950 [(explained in *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. 409). The power of a corporation organized under a legislative charter are only such as the statute confers; and *the enumeration of them implies the exclusion of all others*. "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." *Id.*, 82, per Mr. Justice Miller]; *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518, 4 L. ed. 629 (a corporation, "being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Id.*, 635, per Mr. Chief Justice Marshall); *Cumberland Teleph. & Teleg. Co. v. Evanville* (U. S. C. C.), 127 Fed. 187; *New Albany Water Works v. Louisville Bkg. Co.* (U. S. C. C. A.), 122 Fed. 776, 58 C. C. A. 576; *Sherman v. American Congregational Assn.* (U. S. C. C. A.), 113 Fed. 609, 51 C. C. A. 529.

Alabama: *Meyer v. Johnston*, 53 Ala. 237 ("a corporation, being a creature of the legislative enactment, has only such powers and capacity as it is endowed with by its creator." *Id.*, 324, per Manning, J.).

Georgia: *First M. E. Church v. Atlanta*, 76 Ga. 181.

Illinois: *People v. Illinois Cent. Rd. Co.*, 233 Ill. 378, 84 N. E. 368, 122 Am. St. Rep. 181 (the general rule is that corporations may exercise those powers expressly given and such others as are necessary to carry the express powers into effect. A power which the law may regard as existing by implication must be one in a sense necessary, needful and suitable to accomplish the objects of the grant; one that is directly and immediately appropriate to the execution of the specific powers and not one that has but a slight, indirect or remote relation to the specific purposes of the corporation); *People, Moloney, v. Pullman's Palace Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366 (*incidental or implied powers* enable a corpora-

Public corporations' powers are not coextensive with those of individuals in respect to the surrender of their franchises and tion to carry in effect its express powers to accomplish the objects for which it exists but *cannot enlarge such express powers* and permit it to engage in enterprises remotely connected with its specific objects); *Chicago Municipal Gas Light & Fuel Co. v. Town of Lake*, 130 Ill. 42, 53, 22 N. E. 616 (where a private corporation is organized under the general incorporation law, the franchises conferred by the State when it was organized are to be ascertained and determined from the objects of the incorporation as stated and set forth in its articles of incorporation. And although the statute under which it was organized vests it with, and authorizes it to exercise all the powers necessary and requisite to carry into effect the objects for which it was formed, nevertheless the general powers intended by the enactment are such powers only as are necessarily incident and supplemental to the special powers granted).

Louisiana: *Milwaukee Trust Co. v. Germania Ins. Co.*, 106 La. 669, 31 So. 298; *State, Jackson, v. Newman*, 51 La. Ann. 833, 25 So. 408, 10 Am. & Eng. Corp. Cas. (N. S.) 217.

Minnesota: *Fuller Laundry Co., In re*, 79 Minn. 414, 82 N. W. 673.

Missouri: *State, Crow, v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593.

Nebraska: *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 103 N. W. 685, 119 Am. St. Rep. 917 (the powers of a corporation in effecting its objects are as broad and comprehensive as those of an individual, unless expressly prohibited); *Lees v. Atchison & N. R. Co.*, 24 Neb. 143, 38 N. W. 43.

New York: *Brooklyn Heights Rd. Co. v. City of Brooklyn*, 152 N. Y. 244 (what powers are implied); *People ex rel. Tiffany v. Campbell*, 144 N. Y. 166 (what powers are implied); *Jemison v. Citizens' Sav. Bk.*, 122 N. Y. 135 (as to power foreign to charter); *Sistare v. Best*, 88 N. Y. 527 (as to contracts within apparent scope of powers); *Curtis v. Leavett*, 15 N. Y. 9 ["corporations, I admit also, can only exercise the powers expressly or incidentally conferred. It scarcely needed a statute of this State to declare a principle of the common law so familiar; and there is nothing in the terms of the statute (1 Rev. St. 600, § 3) quoted with so much emphasis to give greater intensity to the doctrine." *Id.*, 54, per Comstock, J.]. See *McGraw, In re, v. Cornell University*, 10 N. Y. Supp. 495, 45 Hun, 354, and cases cited.

Ohio: *Central Ohio Natural Gas & F. Co. v. Capital City Dairy Co.*, 60 Ohio St. 96, 63 N. E. 711, 41 Ohio L. J. 312, 10 Am. & Eng. Corp. Cas. (N. S.) 228, 64 L. R. A. 395.

Oregon: *Beers v. Dallas*, 16 Ore. 334, 18 Pac. 835.

Texas: *Ft. Worth St. Rd. Co. v. Rosedale St. Rd. Co.*, 68 Tex. 169, 4 S. W. 434; *Gulf, Colorado & Santa Fe R. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156.

Utah: *Weyeth Hardware & M. Co. v. James-Spencer-Bateman Co.*, 15 Utah, 110, 47 Pac. 604.

Articles of incorporation under general laws have the effect of a charter when necessary to ascertain the extent of the powers conferred upon the

the delegation of their duties to others; an individual owns property unaffected by a necessity to use it in the performance of duties in which the public has an interest, and is not restrained by charter limitations.⁵

§ 224. Corporation as Entity.

A corporation is an entity irrespective of, and entirely distinct from, the persons who own its stock, and it is well settled that all the shares in a corporation may be held by a single person and yet the corporation continue to exist; nor does the fact that one person owns all the stock, make him and the corporation one and the same person. The corporation does not lose its legally distinct and separate personality by reason of the ownership of the bulk or whole of its stock by another; nor does the fact that all the shares of a corporation pass into the ownership of one person, operate to dissolve the corporation. It is also immaterial whether the sole owner of stock is a man or another corporation, and the corporation owning such stock is as distinct from the corporation whose stock is owned as the man is from the corporation of which he is the sole member.⁶

corporation so organized. *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.*, 16 Utah. 246, 52 Pac. 168, 4 L. R. A. 851, 8 Am. & Eng. Corp. Cas. (N. S.) 98. See also *Detroit Driving Club v. Fitzgerald*, 109 Mich. 670, 67 N. W. 899, 4 Am. & Eng. Corp. Cas. (N. S.) 546, 3 Det. L. N. 232; *International Boom Co. v. Rainy Lake River Boom Corp.*, 97 Minn. 513, 107 N. W. 735.

Assignment of claim for damages not connected with corporation's purposes of incorporation and based upon a claimed conspiracy to defraud is not within the power of the corporation to acquire. *John V. Farwell Co. v. Josephson*, 96 Wis. 10, 70 N. W. 289, 37 L. R. A. 138, 142, 71 N. W. 109.

Railroad corporations possess only those rights, powers or properties which the charters of such corporations confer upon them, either expressly or as incidental to their existence and this applies to all other corporations. *St. Louis, Iron Mountain & Southern Ry. Co. v. Paul*, 64 Ark. 83, 40 S. W. 705, 62 Am. St. Rep. 154, 37 L. R. A. 504.

⁵ *Southern Electric Securities Co. v. State*, 91 Miss. 195, 44 So. 785.

⁶ *Commonwealth v. Monongahela Bridge Co.*, 216 Pa. St. 108, 114, 115, 64 Atl. 909, per Potter, J., citing or quoting *Exchange Bank of Macon v. Macon Construction Co.*, 97 Ga. 1, 6, 25 S. E. 326; *Kendall v. Klapperthal Co.*, 202 Pa. 596, 607, 52 Atl. 92; *Rhawn v. Edge Hill Furnace Co.*, 201

It is also held that a corporation is an entity, irrespective of the persons who own all of its stock; that the fact that one person owns all the stock does not make such owner and the corporation one and the same person; and that there is not any identity between the individual or the corporation which owns such stock in another corporation, and that latter corporation.⁷

Pa. 637, 51 Atl. 360; *Monongahela Bridge Co. v. Pittsburg & Birmingham Traction Co.*, 196 Pa. 25, 46 Atl. 99, 10 Cyc. 1277.

⁷ *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001.

As to corporation being entity distinct from stockholders, see the following cases:

United States: *Central Trust Co. of N. Y. v. Western North Carolina Rd. Co.*, 89 Fed. 31, per Simonton, Cir. J. ("this sovereign power made of several persons a single entity"); *McCabe v. Illinois Central Rd. Co.*, 13 Fed. 827, 828 (is a legal entity, per Love, D. J.).

Alabama: *State v. Stebbins*, 1 Stew. (Ala.) 209, 306-308 [per Saffold, J., citing *Bank of United States v. Dandridge*, 12 Wheat. (25 U. S.) 91, per Marshall, C. J., to point that it is one entire impersonal entity].

Illinois: *Ford v. Chicago Milk Shippers' Assoc.*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298 (while legal entity and distinct from persons composing it, it cannot act independently of natural persons constituting it, per Phillips, J.).

Kentucky: *Lewis v. Maysville & Big Sandy Rd. Co.*, 25 Ky. L. Rep. 948, 76 S. W. 526 (when statute refers to entity and not to individual stockholder's right of removal to Federal Court, cannot be defeated on ground that corporation not a legal entity).

Maryland: *Folsom v. Detrick Fertilizer & Chemical Co.*, 85 Md. 52, 69, 36 Atl. 446 (corporation is person distinct from stockholders, per Bryan, J.).

Nebraska: *Home Fire Insurance Co. v. Barber*, 67 Neb. 644, 666, 93 N. W. 1024 (stating when separate and distinct in law and when not in equity, per Pound, C.).

New York: *Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Elec. Light Co.*, 42 N. Y. Supp. 781, 788, 12 App. Div. 199 (word "entity" is merely descriptive but cannot act independently of persons composing it, per Green, J.); *People v. North River Sugar Refining Co.*, 3 N. Y. Supp. 401, 408, 16 Civ. Proc. R. 1, 2 L. R. A. 33 (is not in reality distinct, although in one point of view an entity, per Barrett, J.); *Supervisors of Niagara v. People*, 7 Hill (N. Y.), 504, 507 (individuality of natural persons is merged in entity, per Bockee, Senator).

Pennsylvania: *Rhawn v. Edge Hill Furnace Co.*, 201 Pa. 637, 51 Atl. 360 (is an entity irrespective of persons owning stock); *Monongahela Bridge Co. v. Pittsburg & Birmingham Traction Co.*, 196 Pa. St. 25, 46 Atl. 99 (same statement as last case).

South Carolina: *State v. Hood*, 15 Rich. L. (S. C.) 177, 188 (corporation is wholly distinct from natural persons composing it, per Inglis, J.).

The distinction between the conduct of a corporation and of its stockholders is important and controls as to questions between the corporation and its stockholders, and between the corporation, or its stockholders, and third persons. This distinction, however, is introduced for convenience and to subserve the ends of justice; but when invoked in support of an end subversive of its policy should be and is disregarded by the courts.⁸

Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved the corporation is regarded as a person separate and distinct from its stockholders or any or all of them. But where it is proceeding in equity to assert rights of an equitable nature, or is seeking relief, upon rules and principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be permitted to recover.⁹

§ 225. Corporation as Entity—Equity.

The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things,

Tennessee: City of Nashville v. Ward, 16 Lea (84 Tenn.), 27, 30 (is not distinct, per Deaderick, C. J.).

* *Southern Electric Securities Co. v. State*, 91 Miss. 195, 207, 44 So. 785, per Calhoun, J., citing *People v. North River Refining Co.*, 3 N. Y. Supp. 401, 7 N. Y. Supp. 406, 54 Hun, 354, 2 L. R. A. 33, 5 L. R. A. 386; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541.

In *Doctor v. Harrington*, 196 U. S. 579, 586, 49 L. ed. 606, 25 Sup. Ct. 355, the court, per McKenna, J., in discussing the question of jurisdiction, and diversity of citizenship for the purpose thereof, makes a distinction between the corporation as such and its stockholders, and merely states in this connection that a corporation has rights and obligations separate from the stockholders and can sue and be sued.

* *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 108 Am. St. Rep. 716, 93 N. W. 1024, considering many authorities.

may not, in a proper case, ignore it to preserve the rights of innocent parties or to circumvent fraud.¹⁰

§ 226. Directors of One Corporation, Directors of Another, Does Not Prevent Suit by or Against—Merger.

Although there is a commingling of officers of two corporations, as when some of the directors of one corporation are directors of another, still it does not prevent them from being distinct corporations, with a right to contract with each other in their corporate capacities, and to sue and be sued by each other in regard to such contracts, where the relations of the parties have not been abused.¹¹ The fact that the stockholders of two separately chartered corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation or prevent the enforcement against the insolvent estate

¹⁰ Rieger, Kapner & Atlmark, *In re*, 157 Fed. 609, 19 Am. B. Rep. 622, 538. The court, per Sater, Dist. J. (p. 629), cites *First National Bank of Chicago v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834, and the following is a part of the quotation in the said case, given by the court: "In contemplation of law, a corporation is a legal entity, an ideal person, separate from the real persons, who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted—convenience in the transaction of business, and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. But the fiction cannot be abused. A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction." The court in the principal case cites also the following authorities: *Cincinnati, Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 200, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; *State v. Standard Oil Co.*, 49 Ohio St. 137, 177-179, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169, 34 St. Rep. 589; *Thompson on Corp.*, § 1077*p*; *Cook on Corp.* (4th ed.) 23; 7 Am. & Eng. Ency. of Law, 633, 634. See also *United States v. Milwaukee Refrigerator Co.*, 142 Fed. 247 (holding corporation a legal entity as a general rule, but will be regarded in law as an association of persons under certain circumstances).

¹¹ *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, citing and quoting from *Leavenworth v. Chicago, Rock Island & Pac. Ry. Co.*, 134 U. S. 688, 707, 33 L. ed. 1064, 10 Sup. Ct. 708 (a case where a foreclosure of a mortgage on a railroad, and its sale under a decree, was held valid, in a suit attacking them for fraud, because of the trust relations of the parties, when there was no collusion or fraud in fact).

of the one of an otherwise valid claim of the other. It is an elementary and fundamental principle¹² that a corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected.¹³

§ 227. Corporations May Sue and Be Sued.

As stated in a preceding section there are, independently of any express powers, certain incidental or implied powers possessed by corporations the exercise of which are necessary to enable them to effect the purposes for which they were created, and among these incidental, implied and necessary powers is that of the common-law right to sue and be sued, plead and be impleaded, in the absence of some special statutory restriction or prohibition, and in the several States there are also provisions under Constitutions and statutes empowering suits to be brought and maintained by and against corporations, or to sue and be sued in their corporate name, or to maintain and defend judicial proceedings, etc.¹⁴ So a power

¹² *Watertown Paper Co.*, In re, 169 Fed. (C. C. A.) 252.

¹³ That corporation an entity, see Dec. Dig. Corp., § 378.

¹⁴ *United States: Railroad Co. v. Harris*, 12 Wall. (79 U. S.) 65, 20 L. ed. 354 ("a corporation is in law, for civil purposes, deemed a person. It may sue and be sued." *Id.*, 81, per Mr. Justice Swayne, in discussing the right to sue a railroad corporation in Virginia, for injuries done there said corporation having been chartered in Maryland and thereafter having its charter confirmed in Virginia); *Bank of United States v. Dandridge*, 12 Wheat. (25 U. S.) 64, 6 L. ed. 552 ("to corporations, however erected, there may be said to be certain incidents attached, without any express words or authority for this purpose, such as the power to plead and be impleaded." *Id.*, 67, per Mr. Justice Story, in discussing the acts of aggregate corporations at the common law); *Falconer v. Campbell*, 2 McLean (U. S. C. C.), 195, 198 (the court declares that the power "to sue and be sued" is among "the ordinary powers of a corporation," but the action was against the directors of a bank to recover the amount of a bill of exchange drawn by the bank, which was incorporated under a statute giving it the power to sue and be sued, plead and be impleaded, etc.).

Alabama: Planters' & Merchants' Bk. of Mobile v. Andrews, 8 Port. (Ala.) 404 (the incidental power and liability of suing and being sued appertains to all corporations, even at common law, unless taken away by positive enactment. *Id.*, 425, per Collier, C. J., in discussing the authority to perform by agents, services incident to the commencement and prosecution of suits).

given to a corporation "to receive, hold and manage" a fund, implies the power to sue for it.¹⁵ It is also well settled that a corporation represents the stockholders in all matters within

Arkansas: See *Rogers v. Galloway Female College*, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636 (as to college established by church standing in *loco ecclesiae* as to right to sue).

Colorado: *Breene v. Merchants' & Mechanics' Bk.*, 11 Colo. 97, 17 Pac. 281 (under the laws corporations may sue and be sued as individuals).

Illinois: *Marsh v. Astoria Lodge*, 27 Ill. (Peck.) 421 (if right to sue is not expressly granted, corporation may still exercise the faculty, if all the powers incident to corporations are conferred upon it); *Estell v. Knights-town & Middletown Turnpike Co.*, 41 Ind. 174 (legal capacity to sue is one of the capacities of every corporation).

Maryland: *McKim v. Odom*, 3 Bland's Ch. (Md.) 407 (is an incident to bodies politic of all descriptions. *Id.*, 419, per Bland, Ch.).

New Hampshire: *Libbey v. Hodgdon*, 9 N. H. 394 ("there seems to be nothing in the character of a corporation to prevent its suing and being sued like a natural person. It is, in legal contemplation, a person, having existence, invested with rights, and subjected to liabilities; and very properly a party to proceedings in courts of law or equity, whenever these rights and liabilities are drawn in controversy." *Id.*, 396, per Willcox, J., in discussing right to sue foreign corporation in State).

New Jersey: *M. B. Faxon Co. v. Lovett Co.*, 60 N. J. L. 128, 30 Atl. 602, 6 Am. & Eng. Corp. Cas. (N. S.) 497 (foreign corporations expressly authorized by statute to sue in State on contracts irrespective of where made); *Leggett v. New Jersey Mfg. & Bkg. Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728 (right to sue and be sued incident to every corporation).

New York: *Thomas v. Dakin*, 22 Wend. (N. Y.) 9 ("the 'franchises and liberties,' or in more modern language, and as more strictly applicable to private corporations, the *powers and faculties* which are usually specified as creating corporate existence are: * * * 1. The power to sue and be sued. * * * These *indicia* were given by judges and elementary writers at a very early day. * * * We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity; * * * 2. To * * * sue and be sued by its corporate name as an individual." *Id.*, 70, 71, per Nelson, C. J.; *Id.*, 98, per Cowen, J. A case where an action was brought by plaintiff as president of a bank, an association formed under the general banking law of 1838 to recover in assumpsit demands or debts due the institution as a bank and not to the members of the association jointly); *Clarrisey v. Metropolitan Fire Department*, 7 Abb. Prac. N. S. (N. Y.) 352 (bodies created by the legislature have an incidental capacity to sue and be sued, independently of any express power; and for such purposes are to be regarded as corporations *sub modo*).

Oregon: *Capital Lumbering Co. v. Learned*, 36 Oreg. 544, 50 Pac. 454,

¹⁵ *Proprietors of White School House v. Port*, 31 Conn. 242.

the scope of its corporate powers transacted in good faith by the officers of the corporation; and this applies to the conceded powers of corporations in bringing and defending ac-

78 Am. St. Rep. 792 ("the rule is well settled that, notwithstanding a corporation may have been created for the transaction of certain business, which is specified in the articles of incorporation, it may invoke any legal or equitable remedy which would be available to an individual under similar circumstances. 1 Morawitz, Priv. Corp. 357. The right of a corporation to sue is a necessary incident to its creation, and whatever its business may be, any right of action which necessarily arises therefrom will receive the consideration of a court to which it may apply for relief." *Id.*, 549, per Moore, J.); *Grant County v. Lake County*, 17 Oreg. 453 (creating a corporation for any purpose impliedly confers upon it the incidental power to sue and be sued. The point, however, in this case was that a county could not be sued at law except as provided by statute).

Tennessee: *Jonesboro v. M'Kee*, 2 Yerg. (10 Tenn.) 167 (some powers are incident to a corporation, although not expressly given, as to sue and be sued, etc.).

"The power of a corporation to sue is * * * one of its incidental powers, although it is most generally expressly given in charters to private corporations." And "it is very obvious that a corporation would be entirely incapacitated to manage its concerns and to carry into effect the objects for which it is constituted if it had not the capacity of protecting its rights and enforcing the just claims in its favor by ordinary judicial process." Angell & Ames on Corp. (9th ed.), § 369. "A corporation is a creature of the charter that constitutes and gives it being, and prescribes bounds and limits to its operations, beyond which it cannot regularly proceed; yet there are some things, incident to a corporation, which it may do without any express provision in the act of incorporating" and "it is incident to sue and be sued." 2 Bacon's Abridg. (ed. 1860), "Corporations," pp. 445, 446 and note. "After a corporation is formed and named, it acquires many powers, rights, capacities, and incapacities. * * * Some of these are necessarily and inseparably incident to every corporation; which incidents as soon as a corporation is duly erected, are tacitly annexed of course, * * * (2) to sue and be sued plead and be impleaded, * * * by its corporate name." 1 Blackstone, Comm. 475 (Hammond's ed., 830) (Lewis's ed., bot. p. 453) (Wendell's ed., 475); 3 Stephens' Comm. (ed. 1845), 175. "It is usual, however, in the United States by the charter or act of incorporation to enable this body politic to sue and be sued." 1 Dane's Abridg. (ed. 1823), chap. 22, p. 460; 5 *Id.*, chap. 143, p. 144. "Corporations have a capacity to sue and be sued by their corporate name" and "private moneyed corporations are not only liable to be sued like private individuals in assumpsit for breaches of contract, but they may be sued by special action on the case for neglect and malfeasance and breaches of duty, and in actions of trespass and trover for damages resulting from trespass and torts committed by their agents under their authority; and the authority of such

tions concerning the rights and obligations of the corporation.¹⁶ A corporation must, however, be sued in the mode prescribed by the legislature.¹⁷ So a corporation organized for the purpose and engaged in the business of operating a machine shop for the construction and repair of machinery, clearly has capacity to sue for work performed in its capacity as a machinist.¹⁸ But corporation rights and interest in law and equity, wrongfully and injuriously affected, must, unless some special ground be shown, be generally asserted by defendant in its corporate name.¹⁹

A corporation cannot be sued without its consent outside of the parish of its domicile on an implied promise to pay the liabilities of a commercial firm.²⁰

§ 228. Corporations as Necessary or Indispensable Parties.

Corporations are indispensable parties to a bill which affects corporate rights or liabilities.²¹ So in an action in a Federal

agents need not be under seal." 2 Kent's Comm. (13th ed.) *284, bot. p. 379. "When a corporation is duly created all other incidents are tacitly annexed." "It is an incident to sue and be sued, plead and be impleaded." 6 Viners' Abridg. (2d ed., 1792), "Corporations," "g," p. 265 and note.

¹⁶ *Singer v. Hutchinson*, 183 Ill. 606, 613, 75 Am. St. Rep. 132.

¹⁷ *Holgate v. Oregon Pac. R. Co.*, 16 Oreg. 123, 17 Pac. 859.

¹⁸ *Pacific Iron & Steel Works v. Goerig* (Wash., 1909), 104 Pac. 151. In this case the contention that the corporation had no legal capacity to sue was founded on the wording of a statute authorizing the filing of liens; it being thought that the classification of the persons authorized to take advantage of the statute was not broad enough to include the corporation (respondent). But whether or not it could claim a lien was declared not to be a material question. "In this proceeding it was not allowed a lien thereunder," per Fullerton, J.

¹⁹ *Bradley v. Richardson*, 2 Blatchf. (U. S. C. C.) 343, Fed. Cas. No. 1,786.

²⁰ *Police Jury Parish of Iberville v. Texas & Pacific Ry. Co.*, 122 La. 388, 47 So. 692. A case of an action to recover damages for the destruction by fire of a parish bridge alleged to have been occasioned by the negligence of defendant railway and a "firm." A third defendant, an oil corporation, was sought to be held liable as having assumed the said commercial firm's obligations and liabilities by taking over its property and rights. The oil company was a foreign corporation with a local domicile in another parish than that of Iberville.

²¹ *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 37 L. ed. 577, 13 Sup. Ct. 691.

Court in Pennsylvania, brought against Pennsylvania stockholders of an insolvent foreign corporation under the laws of the foreign State the corporation is an indispensable party defendant.²²

§ 229. Same Subject—Equity.

All persons materially interested in the subject of a suit in chancery, ought to be made parties, either plaintiffs or defendants; but this is a rule established for the convenient administration of justice, and is more or less within the discretion of the court; and it should be restricted to parties whose interests are in the issue, and to be affected by the decree; the relief granted, will always be so modified, as not to affect the interests of others.²³ Again, persons or corporations interested must be made parties to a bill in equity for an injunction, especially where the object of the bill cannot be attained without seriously affecting the interests of such persons or corporations.²⁴

The proposition, that to a shareholder's suit to enforce a corporate right in protection of their equitable interest in the corporate assets the corporation is a necessary party, has been approved and followed in numerous cases. Such corporation is said to be a necessary party because its rights are involved in the litigation which would necessarily be fruitless unless the corporation and the stockholders represented by it other than the plaintiffs, are bound thereby.²⁵

Some text-writers and some cases go farther and hold such corporation to be an indispensable party, not simply on the general principles of equity pleading, in order that it may be bound by the decree, but in order that the relief when granted may be awarded to it, as a party to the record, by the decree;²⁶

²² *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* (U. S. C. C.), 84 Fed. 76, 7 Pa. Dist. Rep. 13, 287.

²³ *Mechanics' Bank v. Seton*, 1 Pet. (26 U. S.) 299, 7 L. ed. 152.

²⁴ *Northern Indiana Rd. Co. v. Michigan Cent. Rd.*, 5 McLean (U. S. C. C.), 444, Fed. Cas. No. 10,321.

²⁵ Citing *March v. Railroad*, 40 N. H. 548, 568; *Davenport v. Dows*, 18 Wall. 626; *Bagshaw v. Railway*, 7 Hare, 114, 131; *Cook, Stock and Stockholders*, § 692.

²⁶ Citing 3 *Pomeroy's Equity Jurisprudence*, § 1095.

or, as it is otherwise expressed, because the relief asked for "must be worked out by or through" the corporation.²⁷

If the relief sought requires a personal judgment against the corporation the principle is well stated in this manner, though as thus broadly put it is not sustained by all the authorities. The ground generally stated is the necessity that the corporation should be bound by the judgment.²⁸

There is a well-defined distinction between necessary and proper parties defendant in suits in equity, and in New York where a complete determination of the controversy cannot be had without the presence of other parties, the court should direct them to be brought in pursuant to § 452 of the Code of Civil Procedure, and it is error for the court to proceed to judgment in the absence of such necessary parties although no objection has been previously taken. As a corollary to the rule aforesaid, where a complaint in equity discloses that certain of the defendants are proper parties, although possibly not necessary parties, the proper party defendant as distinguished from a necessary party is not entitled to test the complaint by the strict rules of demurrer.²⁹

Although, in general, a bill in chancery will not be dismissed for want of proper parties, the rule resting as it does upon the supposition that the fault may be remedied, and the necessary parties supplied, does not apply when this is impossible, and whenever a decree cannot be made without prejudice to one not a party. In such a case the bill must be dismissed. Hence, in a case where, if all the partners were made parties to the bill, the court in which the bill was filed would, from the character of its jurisdiction (which was confined to persons resident within particular districts, which one of the partners here was not), be without any jurisdiction of the controversy, the bill must be dismissed.³⁰

²⁷ Citing *Black v. Huggins*, 2 Tenn. Ch. 780; 1 *Morawitz, Corp.*, § 257.

²⁸ *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 286, per Parsons, C. J.

²⁹ *Mawhinney v. Bliss*, 124 App. Div. 609, 109 N. S. Supp. 332.

³⁰ *Bank v. Carrollton Railroad*, 11 Wall. (78 U. S.) 624, 20 L. ed. 82.

But it is not indispensable that all the parties in a suit in equity should have an interest in all the matters contained in the suit; it will be sufficient, in order to avoid the objection of multifariousness, if each party has an interest in some material matters in the suit, and they are connected with the others. To support the objection to multifariousness to a bill in equity, because the bill contains different causes of suit against the same person, two things must concur; first, the grounds of suit must be different; second, each ground must be sufficient, as stated, to sustain a bill.³¹

A public nuisance may be abated on a bill in equity, brought by a private party, who has suffered special damage, and it is necessary for the plaintiff in such a bill to show that he has sustained individual injury by the nuisance. In such a case the private party, though nominally suing on his own account, acts rather as a public prosecutor, on behalf of all who are or may be injured. If he has partners in the particular business affected by the nuisance, he need not join them as plaintiffs, any more than he need join other persons who have suffered similar injuries.³²

§ 230. Corporation as Salvors May Maintain Suit for Salvage.

A corporation is not disqualified, by the simple fact of its being a corporation, from maintaining a suit for salvage. Hence, where a service, in its nature otherwise one of salvage, was performed by a stock company, chartered to hire or own vessels manned and equipped to be employed in saving vessels and their cargoes wrecked, and to receive compensation in like manner as private persons, and where the persons actually performing the service had no share in the profits of the company, but were hired and paid under permanent and liberal arrangements and rates of pay—the net profits being divided among stockholders—such service was held to be a

³¹ *Brown v. Guarantee Trust & S. D. Co.*, 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. 127.

³² *Mississippi & Missouri Ry. Co. v. Ward*, 2 Black (67 U. S.), 485, 17 L. ed. 311.

salvage service, and the corporation to be entitled to pay as salvors accordingly.³³

§ 231. Power of Corporation To Sue and Be Sued Includes Power to Arbitrate.

Although the charter of a company does not, in terms, give the power to refer, yet a power to sue and be sued includes a power of reference, that being one of the modes of prosecuting a suit to judgment. So, also, a power to agree with a proprietor for the purchase or use of land, includes a power to agree to pay a specified sum or such sum as arbitrators may fix upon. But it is immaterial whether the power of reference is lodged in the president and directors or in the stockholders assembled in general meeting; for the entire corporation is represented in court by its counsel, whose acts, in conducting the suit, are presumed to be authorized by the party.³⁴

§ 232. State Bank Converted Into National Bank—Right To Sue in Former Name.

The conversion of a State bank into a national bank, with a change of name, under the National Banking Act, does not affect its identity or its right to sue upon liabilities incurred to it by its former name.³⁵

§ 233. Corporation's Right To Sue—Waiver—Foreign Corporation.

The want of capacity of a foreign corporation to sue because of noncompliance with statutory conditions precedent, such as the prohibition against suing, etc., without alleging and proving the payment of its annual license fee last due, may, it is held, be waived and is waived if objection is not taken by demurrer or answer, and the action cannot be dismissed for failure to prove payment of the fee.³⁶

³³ *Camanche, The*, 8 Wall. (75 U. S.) 448, 19 L. ed. 397, cited in *Blackwall, The*, 10 Wall. (77 U. S.) 1, 11, 19 L. ed. 870.

³⁴ *Alexandria Canal Co. v. Swann*, 5 How. (46 U. S.) 83, 12 L. ed. 60.

³⁵ *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. ed. 162, 12 Sup. Ct. 450.

³⁶ *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031 (three judges dissenting).

On a trial upon the merits, it is too late to take exception to the corporate capacity of the plaintiffs to sue; this should be done by a plea in abatement, before the trial; and the omission to do this is a waiver of the objection.³⁷

§ 234. When Corporation Not Entitled to Equitable Consideration of Courts—Consolidation to Prevent Competition—Fraud on Public.

The public welfare lies at the basis of corporate privileges. The interests of the stockholders are but secondary. Therefore, if a corporation willfully frustrates the intention so underlying its grant of power, by an act which is a fraud on the public, it is not entitled to the equitable consideration of the courts. This rule was applied in a case where the aid of equity was sought by an electric light and heat company, to restrain competition in furnishing electric light. The injunction sought was refused, it appearing that the charter privileges of the petitioner had been misused, so as to hinder the public interests by a combination with another corporation, so as to suppress the use of the commodity for the supplying of which the franchise was granted.³⁸

§ 235. Consolidation—Successor of Corporation—Rights of.

A successor of a corporation which had been sued at law on a liability existing before consolidation, can assert all the rights and equities and defenses that the original corporation could assert, it having succeeded to the merged corporations' respective rights, etc., and become liable for their debts, etc.³⁹

§ 236. Foreign Corporations—Parties.

In Florida it is held that under the law of comity the courts of Florida will entertain a suit in chancery brought by a foreign corporation where the question presented by the bill is

³⁷ *Conard v. Atlantic Ins. Co.*, 1 Pet. (26 U. S.) 386, 7 L. ed. 189.

³⁸ *Scranton Elec. L. & H. Co. v. Scranton Illum. H. & P. Co.*, 122 Pa. St. 154, 9 Am. St. Rep. 79, 3 Am. Elec. Cas. 499, 15 Atl. 446.

³⁹ *Southern Steel Co. v. Hopkins et al.*, 157 Ala. 175, 117 So. 274.

the right of such a corporation to protect its real estate from trespass, of which equity has jurisdiction, inasmuch as such a corporation is not forbidden by the statute law there from holding real estate.⁴⁰

In Idaho where a foreign corporation rightfully acquired title to real property within the State at a time when it had in all respects complied with the law of the State in respect to foreign corporations, but failed to comply with a subsequent enactment, but no forfeiture of its title has been judicially declared, it will be allowed a standing in court to protect its title and right of possession as against a private party who trespasses thereon or seeks or attempts to appropriate the same to his own use and benefit.⁴¹ Under the Massachusetts statute, prohibiting the maintenance of actions or a recovery in the State Courts by foreign corporations, so long as they fail to comply with the requirements of the statute, failure to comply with the said enactment must be pleaded seasonably in order to avail a defendant; and the effect of the statute is, when noncompliance with its terms is seasonably and properly pleaded to stay proceedings until the temporary disability is removed, which can be done at any time after as well as before resort to the courts.⁴²

⁴⁰ *Indian River Mfg. Co. v. Wootin*, 55 Fla. 745, 46 So. 185.

⁴¹ *War Eagle Con. Min. Co. v. Dickie*, 14 Idaho, 534, 94 Pac. 1034.

⁴² *National Fertilizer Co. v. Fall River Five Cent Sav. Bk.*, 196 Mass. 458, 82 N. E. 671 (the court, per Rugg, J., said: "The great weight of authority in other jurisdictions supports the conclusion here reached"); *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 534, 69 S. W. 572, 91 Am. St. Rep. 87; *Woolfort v. Dixie Cotton Oil Co.*, 77 Ark. 203; 91 S. W. 306, 113 Am. St. Rep. 139; *Sutherland-Innes Co. v. Chaney*, 72 Ark. 327, 80 S. W. 152; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *State v. American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041; *Deere v. Wyland*, 69 Kan. 255, 261, 76 Pac. 863; *Hamilton v. Reeves*, 69 Kan. 844, 76 Pac. 418; *Ryan Livestock & Feeding Co. v. Kelley*, 71 Kan. 874, 81 Pac. 470; *California Savings & Loan Society v. Harris*, 111 Cal. 133, 43 Pac. 525. There is nothing in conflict with this view in *Wood Co. v. Caldwell*, 54 Ind. 270, or in *Security Savings & Loan Association v. Elbert*, 153 Ind. 198, 54 N. E. 753; *Neuchatel Asphalt Co. v. Mayor of New York*, 155 N. Y. 373, 49 N. E. 1043, and *Huttig Bros. Manuf. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073, were proceedings to enforce liens where the statement was filed before but the petition brought after compliance with

Under § 15 of the General Corporation Law of New York,⁴³ providing that "no foreign stock corporation other than a moneyed corporation shall do business in this State without having first procured * * * a certificate that it has complied with all the requirements of law * * *," and that "no foreign stock corporation doing business in this State upon any contract made by it in this State, unless prior to the making of such contract it shall have procured such certificate," an action by a foreign stock corporation engaged in the business of manufacturing within the State, to recover upon a policy of fire insurance executed within the State, for a loss occasioned by the destruction of its property within the State by fire, cannot be maintained, unless prior to the making of the contract of insurance it had procured the required certificate.⁴⁴ In certain cases a foreign insurance company may maintain an action even though it has failed to comply with the State laws in respect to being authorized to do business within its boundaries.⁴⁵ Where it does not appear anywhere in the pleadings

the statute, and it was held that the proceedings might be maintained. See *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 897; *Wetzel & Tyler Railway v. Tennis Bros. Co.*, 145 Fed. 458; *Crefeld Mills v. Goddard*, 69 Fed. 141; *Swift v. Little*, 28 R. I. 108, 65 Atl. 615; *Hastings Industrial Co. v. Moran*, 143 Mich. 679, 107 N. W. 706. There are contrary authorities. *Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; *United Lead Co. v. Reedy Elevator Manuf. Co.*, 222 Ill. 199, 78 N. E. 567; *Heileman Brewing Co. v. Peimeise*, 85 Minn. 121, 88 N. W. 441. These cases, however, construe statutes of different phraseology, and proceed upon reasoning respecting the effect of statutes as to foreign corporations, which is not in harmony with the trend of decisions in this commonwealth as indicated in the cases cited. *Allen v. Milwaukee*, 128 Wis. 678, 106 N. W. 1099, 5 L. R. A. (N. S.) 680; *Cary Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743, and *Halsey v. Jewett Dramatic Co.*, 99 N. Y. Supp. 1122, 114 App. Div. 420, deal with statutes so different from our's that, although apparently contrary to this decision, they throw no light upon the question here depending."

⁴³ L. 1892, chap. 687, am'd L. 1901, chap. 538, § 1.

⁴⁴ *South Bay Co. v. Howey*, 190 N. Y. 240, 83 N. E. 26, rev'g 98 N. Y. S. 909, 113 App. Div. 382. Action by foreign corporation; defense to pay license fee; facts must be pleaded; defense available against assignee. *Halsey v. Jewett Dramatic Co.*, 190 N. Y. 231, rev'g 114 App. Div. 420.

⁴⁵ *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. German Ins. Co. (Ind. App., 1909)*, 87 N. E. 995 (citing *Phoenix Ins. Co. v. Pennsylvania*

that the cause of action in any manner grew out of, or was affected by, the alleged wrongful act of a foreign corporation in doing business in a State without complying with its statute, which in such case makes it liable to a fine and prohibits it from suing in said State either in contract or tort but does not invalidate its contracts, such corporation is not precluded from suing in the Federal Courts within the State upon a cause of action arising under a United States statute.⁴⁶

§ 237. Foreign Corporations—Parties—Presumptions.

All corporations and persons are presumed to have complied with the law and to have legal capacity to sue; this applies to a foreign corporation and compliance with State statutes requiring it to appoint a resident agent.⁴⁷ But under a New York decision it is held that a foreign corporation suing on a contract made in that State must allege and prove a compliance with the General Corporation Law⁴⁸ governing the right of foreign stock corporations to do business and sue in that State; and that where the plaintiff, suing on such a contract, alleges that it is a foreign corporation, there exists a presumption that it is a foreign stock corporation and within the prohibition contained in said General Corporation Law.⁴⁹

Rd. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405), an action by the insurance company against the railway company to recover damages on account of insurance on property burned by fire negligently set to other property and spreading; by payment of the insurance the company became subrogated to the rights of the insured and brought suit in that capacity. It was also declared in the case that an answer, which does not amount to a plea that a party is not a corporation or deny its corporate existence, and at the most denies its right to do business in the State, falls short of denying the corporation's right to prosecute an action sounding in tort.

⁴⁶ Vitagraph Co. of America v. Twentieth Century Optiscope Co. (U. S. C. C.), 157 Fed. 699.

⁴⁷ F. H. Rogers Lumber Co. v. McRea (Ind. Ty. Ct. App., 1907), 104 S. W. 803.

⁴⁸ Section 15. See next following note.

⁴⁹ Portland Company v. Hall & Grant Construction Co., 108 N. Y. Supp. 821, 123 App. Div. 495, granting rehearing in 106 N. Y. Supp. 641, 121 App. Div. 779; § 15, Gen. Corp. Law (Laws 1892, chap. 687). See Laws 1909, chap. 28, § 15; 2 Birdseye's Cumming & Gilbert's Consol. Laws N. Y. Annot., p. 1979. See Groton Bridge & Mfg. Co. v. American Bridge Co.,

§ 238. Right of Corporation To Sue as Affected by Dissolution.

In a large majority of the States there are statutory provisions which either expressly or impliedly extend the corporate existence for the purpose of prosecuting or defending suits or other specified purposes so that the decisions in relation to the right of a corporation to sue or be sued must be considered in the light of these statutes.

§ 239. Same Subject.

Although a corporation is insolvent and a creditor's suit pending, and even though a receiver of its assets has been appointed and a decree rendered for the sale of the same corporate existence is held not to be thereby affected or the corporation prevented from acting as such and incurring indebtedness.⁵⁰ In a Federal case it appeared that there were proceedings under the statutes of a State, brought at the instance of the bank commissioners, to wind up a banking corporation and the property and assets were transferred and vested in a duly appointed and qualified assignee to be converted into money and distributed by decrees of the State Court as provided by statute; a commissioner was also appointed in accordance with the statute to examine and allow claims, against the corporation, of depositors and other creditors. It was held that the corporation was not at once dissolved by the proceedings so that a judgment could not be rendered against it by the Federal Court.⁵¹ Under an Alabama case after the char-

151 Fed. 871, as to noncompliance with said section not preventing action in Federal Courts.

⁵⁰ *Atlas Ry. Supply Co. v. Lake & River Ry. Co.*, 134 Fed. 503.

⁵¹ *Anglo-American Land, Mortgage & Agency Co. v. Cheshire Prov. Inst.* (U. S. C. C.), 124 Fed. 464, *aff'd* in *Cheshire Provident Inst. v. Anglo-American Land Mortgage & Agency Co.* (U. S. C. C. A.), 132 Fed. 968; *s. c.*, 134 Fed. 152. In this case in 132 Fed. 968, affirming the case in the lower court, it was said, *per Brown, Dist. J.*: "Upon an examination of chap. 162, Pub. St. N. H., 1901, §§ 12 to 24, inclusive, in connection with the plea and stipulation, it is clear that the Circuit Court was right in holding that the corporation had not been dissolved. * * * The argument that, because the assets of the corporation are in the hands of an assignee, a creditor should not be permitted to pursue to judgment an action against the corpo-

ter of a corporation is declared forfeited, it can do no act by which rights can be acquired, nor can it maintain a suit to enforce those acquired during the continuance of the charter, unless its power and capacity for that purpose is continued by statute, after its existence as a corporation is ended.⁵² Under another case in the same State a bank has no power, after a judgment declaring its charter forfeited, to make a contract, except so far as it may be authorized to act by a statute providing for the ascertainment of the fact, whether its charter was forfeited or not.⁵³ In Colorado the dissolution of a corporation cannot be pleaded in bar of an action against it where the cause of action arose before the dissolution.⁵⁴ And in that State it is held that no action lies against a corporation as such after its dissolution. But before dissolution and until some action is taken in court, which, in its nature and effect, may operate to restrain or defeat the right so to do, creditors are at liberty and have the right to pursue the remedies provided by law for the collection of demands justly due to them from such corporation, unless they have in some way deprived themselves of such right.⁵⁵ In a Connecticut case an adjudication, on *quo*

ration, is disposed of by the case of *Parsons v. Eureka Powder Works*, 48 N. H. 66. See also *Moran v. Sturges*, 154 U. S. 256, 274, 275, 14 Sup. Ct. 1019, 38 L. ed. 981. Furthermore, in chap. 148, Pub. St. N. H., 1901, §§ 18, 19, are provisions similar to those of other States, continuing as a body corporate, for the purpose of prosecuting and defending suits, a corporation whose corporate existence has been terminated in any way, and providing that the repeal or amendment of a charter or laws under which it was established shall not impair a liability previously incurred. There was no legal obstacle to a judgment of the Circuit Court against the corporation to determine the question of debt or no debt. *Chemical Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. ed. 595; *Hess v. Reynolds*, 113 U. S. 73, 77, 5 Sup. Ct. 377, 28 L. ed. 927; *Clark v. Bever*, 139 U. S. 103, 11 Sup. Ct. 468, 35 L. ed. 88; *Byers v. McAuley*, 149 U. S. 620, 13 Sup. Ct. 906, 37 L. ed. 867; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Kittredge v. Race*, 92 U. S. 116, 121, 23 L. ed. 488; *Edwards v. Hill*, 59 Fed. 723, 8 C. C. A. 233; *Walker v. Brown*, 63 Fed. 204, 11 C. C. A. 135."

⁵² *Saltmarsh v. Planters' & Merchants' Bk.*, 17 Ala. 761.

⁵³ *Saltmarsh v. Planters' & Merchants' Bk.*, 14 Ala. 668.

⁵⁴ *Steinhauer v. Colmar*, 11 Colo. App. 494.

⁵⁵ *Breene v. Merchants' & Mechanics' Bk.*, 11 Colo. 97, 100, 17 Pac. 280, per *De France*, C.

warranto proceedings, that a corporation had no legal existence after a certain date, does not destroy such rights of property as it then held. Its effect is to transfer the custody of the property of the supposed corporation from the directors, as such, to them as trustees for those interested in the succession, in order to satisfy such indebtedness as may exist and to transfer the balance, if any, to the stockholders *pro rata*.⁵⁶

In the same State creditors of a corporation who had no knowledge of the pendency of proceedings for its dissolution, and were intentionally prevented from receiving notice thereof by those who were conducting the winding-up suit, are aggrieved by a judgment dissolving such corporation while it has outstanding liabilities and owns property or rights of action which are applicable to their payment. And notwithstanding the dissolution of a corporation by judicial decree, those really interested in it—its members or its creditors—can always rely upon obtaining adequate protection from the courts. So long as the control of the court over the winding-up proceedings continues according to the ordinary course of judicial procedure, so long it may open and set aside the judgment of dissolution for sufficient cause duly shown, and at the same time revive the corporation for the purpose of enabling it to be wound up properly. So one corporation which has transferred all its assets to another, upon the agreement of the second to pay the debts of the first, can proceed in equity to compel the performance of the agreement; and that right constitutes an asset which its creditors can pursue in equity. If it has been improperly dissolved, the reopening of the judgment of dissolution, so that the company or its receiver may enforce the agreement for the benefit of its creditors, is an appropriate remedy. And, while a surety cannot sue the principal debtor, at law, until he has been damnified, if he has, as

⁵⁶ New York, Bridgeport & Eastern Ry. Co. v. Motil, 81 Conn. 466, 71 Atl. 563. But what powers the directors, as such trustees, would have in the disposition of such property, in the absence of the appointment of a receiver, *quære*. The case was an action under the General Statutes, § 4053, to settle title to land.

part of the contract of suretyship, put all his property in the principal's hands, he may have relief in equity, should the latter, while retaining the property, avoid payment of the debt in violation of the rights of the creditor.⁵⁷

"The analogy between the death of a natural person and the dissolution of an artificial person is an imperfect one. Behind the artificial person stand and survive the other persons, natural or artificial, who really composed it.

"The artificial person known as the Connecticut River Manufacturing Company never existed save in contemplation of law. When it sought dissolution by means of a judicial action, and assumed the position of an ordinary suitor, it became entitled to all the benefits and subject to all the burdens that are incident to that position. A corporation which resists unsuccessfully a stockholder's application for its dissolution could not be precluded by the judgment from appealing for errors in law, notwithstanding the judgment pronounced its existence at an end. It would remain in existence for the purpose of protecting itself against that judgment, the operation of which the appeal would meanwhile suspend.⁵⁸ So if it procure a judgment of dissolution, third parties ought not to lose a remedy against it, or one which can only be enforced through it, if, as to them, that judgment is one that, in equity, cannot stand, and to open it and reinstate the corporation in life would smooth the way towards making that remedy effectual.

"A corporation is called into existence and invested with the attribute of personality by the sovereign power of the State. If created for a limited term, and for that only, or if constituted subject to conditions the performance of which becomes impossible, a franchise thus expiring may be extended in duration or renewed by subsequent action on the part of the sovereign, even if that be had after a dissolution has occurred.⁵⁹

⁵⁷ *Sullivan County Railroad v. Connecticut River Lumber Co.*, 76 Conn. 464, 465.

⁵⁸ *Giles v. Stanton*, 86 Tex. 620.

⁵⁹ *Colchester v. Seaber*, 3 Burr, 1866; *Rex v. Passmore*, 3 T. R. 199;

This does not create a new artificial person. It is a revival of the original corporation, and a revival after it had once ceased to exist. The harsh doctrine of the common law, that the absolute and unqualified dissolution of a corporation extinguished *ipso facto* alike all its property rights and all its obligations was never received in equity. Those really interested in them—its members or its creditors—can always rely on obtaining adequate protection from the courts. Every moneyed corporation is, in a sense, a trustee for those who own its capital or have a right to look to it for security. A trust never fails for want of a trustee, and whenever necessary the State, in some form of proceeding, can and will supply one.

"It follows from these principles that when the legislative power has committed to the judicial power jurisdiction to dissolve corporations by judgments rendered in winding-up proceedings, so long as the control of the court over those proceedings continues according to the ordinary course of judicial procedure, so long may it open and set aside such a judgment, for sufficient cause duly shown, and at the same time reinstate the corporation in life for the purpose of enabling that to be done properly which had been undone because done improperly. The Superior Court opened the judgment because the affairs of the manufacturing company had not been properly wound up. That they might now be properly wound up, it was within its power to revive the company and thus facilitate at once resistance to any unjust demands against it, and the enforcement of all just demands in its favor."⁶⁰

Again, in that State receivers of corporations are authorized by statute to bring suits in their own names, or in the names of the corporations, to defend all suits brought against either, and to do in their own names, or in the names of the corporations, all things necessary or proper in the execution of their trusts. It is held not to be a legislative recognition of

Bleakney v. Farmers' & Mechanics' Bank, 17 S. & R. (Pa.) 64. See *Wilcox v. Continental Life Ins. Co.*, 56 Conn. 468, 477.

⁶⁰ *Sullivan County Railroad v. Connecticut River Lumber Co.*, 76 Conn. 464, 473, 474, per Baldwin, J.

the capacity of such corporations to sue and be sued after a decree annulling their charters.⁶¹ So where by decree of court receivers were appointed for a life insurance company and the company's property was vested in them and its charter annulled; and a suit was pending at the time against the company in which its property had been attached, it was held that the suit was abated and the attachment lien destroyed by the dissolution of the company.⁶²

The legal existence of a corporation is not cut short by its insolvency and the consequent appointment of a receiver, and there is nothing in the statutes relating to national banks which takes them out of the operation of this general rule.⁶³

§ 240. Same Subject.

In Michigan a corporation is dissolved with the expiration of its charter, and, except as given the right to wind up its business after such expiration, within a time limited by statute, its subsequent transactions are void.⁶⁴ So a corporation chartered by a special act of the legislature to exist for a certain period of time and which subsequently has by statute an additional period of time given it for the purpose of winding up its affairs cannot sue thereafter under a claim that its charter is extended by another statute where such statute is unconstitutional.⁶⁵

Under a Kansas decision in 1892 the First State Bank of Jetmore was chartered for all the purposes then permitted by law to banking corporations. It commenced business and continued to operate as a banking corporation until 1897. It then went into voluntary liquidation, paid off its depositors,

⁶¹ Wilcox v. Continental Life Ins. Co., 56 Conn. 469, 16 Atl. 249.

⁶² Wilcox v. Continental Life Ins. Co., 56 Conn. 468, 16 Atl. 249.

⁶³ Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1, 16 Sup. Ct. 439, 40 L. ed. 595.

⁶⁴ Clark v. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083. Time is limited to three years under Indiana statute, § 3429; Burns, 1901; § 3006, Rev. Stat., 1881, and Horner, 1901.

⁶⁵ Clark v. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217.

surrendered to the bank commissioner the certificate of authority to transact business which it had obtained from him, and ceased to transact any business except to collect what it could of the debts owing to it and to distribute the proceeds among its stockholders by way of closing up its affairs. In 1905 it brought a suit upon a promissory note given to it in 1896. It was held (1) that the bank continued to be a banking corporation after the steps taken in 1897, as before; (2) that the period for which the bank was chartered not having expired, no forfeiture having been suffered, and no judgment of dissolution having been rendered against it, the corporation is still in existence; (3) that the bank had capacity to sue as a banking corporation when the action referred to was instituted; (4) that after the bank had paid its depositors and had surrendered its certificate of authority to do business it was no longer subject to the provisions of the banking act requiring reports of its financial condition to be made to the bank commissioner; (5) that after the steps taken in 1897 the bank was not "doing business" within the meaning of § 1283 of the General Statutes of 1901, requiring financial statements to be filed with the Secretary of State as a condition precedent to the maintenance of an action or the recovery of a judgment; (6) that the bringing of the suit referred to did not constitute "doing business" within the meaning of the statute just cited.⁶⁶

In another case in the same State it is held that after a corporation is dissolved and has ceased to exist it cannot maintain an action in its former name as a corporation against one of its own members who had received property from the company, or who had received more than his share thereof, or who owed the company. The only proper remedy, in such a case, would be an action by one or more of the members against the others for an accounting, and to settle and close up all the affairs of the company.⁶⁷

In Louisiana although a corporation had expired by limi-

⁶⁶ *Wilson v. First State Bank of Jetmore*, 77 Kan. 589, 95 Pac. 404.

⁶⁷ *Kurtz v. Paola Town Co.*, 20 Kan. 397.

tation, and judgment of forfeiture of charter had also been pronounced against it on behalf of the State, yet, where, from the nature and objects of the institution, a power to liquidate its affairs, after the expiration of its charter, might have been foreseen as absolutely necessary, the power to accept from the State an extension of the charter, for the purposes of liquidation, will be implied; and this extension enabled it to sue a defaulting stockholder, notwithstanding the enabling statute was passed subsequent both to the decree of forfeiture, and the expiration of the charter by limitation.⁶⁸

The Compiled Laws of Michigan,⁶⁹ in relation to the voluntary dissolution of corporations, provide that, on entry of a decree dissolving the corporation and appointing a receiver, the corporation shall cease. Section 10,887, provides that, whenever a receiver of a corporation has been appointed, new suits may be brought and carried on by the receivers in their own names or in the name of the corporation; and § 8, chap. 230, p. 2627, provides that corporations whose charters shall have been annulled by forfeiture, or otherwise, shall continue to be bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting or defending suits by or against them. After the rendition of a judgment in a court of Illinois against a Michigan corporation, the voluntary dissolution of the defendant was had and a receiver appointed, but the Circuit Court in which the receivership proceedings were had made an order authorizing the receiver to sue out a writ of error in the Supreme Court of Illinois, to review the judgment in question. Held, that the receiver had a right to sue out the writ of error in the name of the corporation.⁷⁰

In Nebraska after the dissolution of a corporation by the expiration of its franchise, or otherwise, an action may be

⁶⁸ Consolidated Assoc. of the Planters of Louisiana v. Claiborne, 7 La. Ann. 318.

⁶⁹ Comp. Laws Mich., Art. 10, 859.

⁷⁰ Syllabus in Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

maintained in the corporate name on a cause of action which accrued to the corporation.⁷¹

In New Hampshire even though a corporate franchise has been practically abandoned by those possessing control over it nevertheless its stockholders may maintain a suit in equity in another State for the recovery of property of said foreign corporation found within its jurisdiction.⁷²

Under a New York decision an action brought against the directors of a stock corporation after voluntary dissolution to recover damages for a negligent injury for which the corporation is answerable cannot be maintained as it is not governed by the general corporation law but by the stock corporation law which makes specific provision for the enforcement of demands against a stock corporation after voluntary dissolution, and, therefore, the cause of action is one which continues against the corporation.⁷³

⁷¹ *Lincoln Butter Co. v. The Edwards-Bradford Lumber Co.*, 76 Neb. 477, 107 N. W. 797.

⁷² *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 56 Atl. 465.

⁷³ *Cunningham v. Glauber*, 115 N. Y. Supp. 259, 61 Misc. 443. *Genl. Corp. Law* (Laws, 1892, p. 1811, chap. 687), § 30, controlled by § 57 of *Stock Corporation Law* (Laws, 1896, p. 994, chap. 932), providing that "said corporation shall nevertheless continue in existence for the purpose of paying * * * any existing debts * * * and may sue and be sued for the purpose of enforcing such debts and obligations." *Marstaller v. Ogden Mills*, 143 N. Y. 398, 38 N. E. 370 (held not an authority in point as the case was that of a business corporation and arose prior to the above § 57 of the stock corporation law); *O'Reilly v. Greene*, 41 N. Y. Supp. 1056, 18 Misc. 423, 426, is cited; *Bank of Louisiana v. Wilson*, 19 La. Ann. 1 (holding that an insolvent, after his surrender, cannot maintain an action against a faithless agent or mandatory; such action and the right to maintain revocatory actions, pass to the syndic, and can be maintained by him alone for the benefit of the creditors; by the forfeiture decree, the corporation loses the faculty of suing in its corporate name); *Miami Exporting Co. v. Gano*, 13 Ohio, 269 (corporation adjudged forfeited and receiver appointed cannot prosecute suit after such dissolution. The corporate name can only be used to prosecute a suit by the receivers, and suit will be dismissed unless receivers set forth sufficient to show character in which they sue). See *Renick v. Bank of West Union*, 13 Ohio, 298 (holding that a writ of error will not lie upon a judgment in favor of a defunct corporation; that a writ directed to a defunct corporation is a nullity; and that the trustees of such corporation must be brought before the court).

§ 241. Injuries to Persons in Execution of Public Trust—Rule as to, When Not Applicable to Private Corporations.

It is a rule that no action can be maintained for injuries resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution and within the scope of their authority, but this rule does not apply to a private corporation authorized to construct works of public improvement, by private capital for private emolument.⁷⁴

§ 242. Injury to Property Generally.

An action on the case may be maintained by a railroad company, as a bailee for hire, for an injury to property, or cars in its possession belonging to another corporation.⁷⁵ So a person having a special or absolute ownership in or possession of stock which is injured or killed by a locomotive engine or train of a railroad company may maintain an action for such injury or loss.⁷⁶

To entitle a property owner to recover for injury to his property by reason of the location of a railroad on a public street, road, or alley, it is not necessary, where the statute permits such a remedy, that the property should be situated upon the street so occupied, but it is sufficient that the property should be situated near enough to it to be injured by the location and occupation.⁷⁷

An abutting owner cannot maintain an action to restrain an electric street railway company, or telegraph or other

⁷⁴ *Downing v. Indiana State Board of Agriculture*, 129 Ind. 443, 28 N. E. 123, 12 L. R. A. 664.

⁷⁵ *Montgomery Gas Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. 735.

⁷⁶ *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. 724, under *Mansfield's Ark. Dig.*, § 5540.

⁷⁷ *Shepherd v. Baltimore & Ohio Rd. Co.*, 130 U. S. 426, 32 L. ed. 970, 9 Sup. Ct. 598, 5 Rd. & Corp. L. J. 580, 17 Wash. L. Rep. 406, 21 Ohio L. J. 343, under *Rev. Stat. Ohio*, § 3283.

As to abutting owners' rights compare *Joyce on Electric Law* (2d ed.), § 1022. See also §§ 295-348.

electric company from constructing its line on the ground that it has not complied with certain conditions or requirements imposed by statute or ordinance or that it is a public nuisance, but he must, in order to obtain such relief, show some special or particular injury to his individual rights. This is the general rule since, in case of a public injury, the action must be in the name of the State.⁷⁸

⁷⁸ *Illinois*: Chicago Teleph. Co. v. Northwestern Tel. Co., 100 Ill. App. 57, aff'd in 199 Ill. 324, 65 N. E. 329.

Maine: Taylor v. Portsmouth, K. & Y. St. Ry. Co., 91 Me. 193, 39 Atl. 560.

New Jersey: Halsey v. Rapid Transit St. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859, 3 Am. Elec. Cas. 283; Borden v. Atlantic Highlands, R. B. & L. B. E. R. Co. (N. J. Ch.), 33 Atl. 276, 28 Chic. L. News, 69, 5 Am. Elec. Cas. 179. See Stockton v. Atlantic Highlands, R. B. & L. B. E. R. Co., 53 N. J. Eq. 418, 32 Atl. 680 (holding that abutting owners and attorney-general are entitled to injunction to restrain construction of street railway where it does not comply with conditions precedent imposed by statute).

New York: Black v. Brooklyn H. R. Co., 53 N. Y. Supp. 312, 32 App. Div. 468.

Ohio: Dietz v. Cincinnati & M. V. Tract. Co. (C. P.), 6 Ohio Dec. 513, 4 Ohio N. P. 399; Sells v. Columbus St. Ry. Co. (Ohio), 28 Week. L. Bull. 172, 4 Am. Elec. Cas. 163.

Pennsylvania: Philadelphia & T. R. Co. v. Philadelphia & B. Pass. R. Co., 6 Pa. Dist. Rep. 289.

Rhode Island: Taggart v. Newport St. Ry. Co., 16 R. I. 668, 19 Atl. 326, 3 Am. Elec. Cas. 306.

Wisconsin: Linden Land Co. v. Milwaukee Elec. Ry. & L. Co., 107 Wis. 493, 83 N. W. 851.

Compare, however, the following cases:

United States: Beeson v. Chicago (U. S. C. C.), 75 Fed. 880, 12 Nat. Corp. Rep. 608, 28 Chic. L. News, 367.

Connecticut: Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107 (holding that owner of the fee in the highway may, by action, enjoin a street railway from laying its tracks where the location is not part of the route authorized under the company's charter).

Ohio: McMaken v. Cincinnati & H. Elec. St. R. Co., 5 Ohio N. P. 367; Denver v. United States Tel. Co., 10 Ohio S. & C. P. Dec. 273.

Pennsylvania: Thomas v. Inter-County St. Ry. Co., 167 Pa. St. 120, 31 Atl. 476, 5 Am. Elec. Cas. 175 (abutting owner may have street railway enjoined when local authorities have not consented to construction); Pennsylvania R. Co. v. Montgomery Pass. Ry. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 468 (injunction to prevent construction of electric railway until compensation made, but operation will not be enjoined if constructed without opposition); Russ v. Pennsylvania Teleph. Co., 15 Pa. Co. Ct.

§ 243. Right of Consignor to Sue Corporation.

In Illinois the consignor for a breach of duty, be he but a bailee, may sue, as he has such a special property in the goods as to give him the right of action. The company cannot excuse itself, in a suit by the consignor for negligence, on the ground that the real title was in his bailor, unless they can show that the property has been taken out of their possession by him without any injury to the lender or bailor; and even in the action of assumpsit the rule is not modified; nor does any distinction exist between the right of a consignor to bring suit against common carriers or against warehousemen, either in the action of tort or *ex contractu*; and a consignee may sue the carrier in tort for loss of goods even though they were shipped to him to be sold on commission.⁷⁹ The court, however, per Carter, J.,⁸⁰ said: "The decisions in the various jurisdictions on this question" as to the right of a person without property or interest in the goods to sue in an action *ex delicto* for a breach of duty by the carrier "cannot be harmonized, and the distinctions between the rights of parties when the action is in assumpsit and when in tort are not always clearly defined."

Under a Pennsylvania decision it is held that the right of action against a common carrier for goods lost or damaged while in the carrier's custody follows ownership of the goods, and anyone having a beneficial interest in them may maintain the action. If the action is in tort it should be brought by the owner of the goods, whether he be consignor, consignee or a third person; anyone having a beneficial interest in the goods may maintain an action for damages thereto; that it is a matter of no consequence at whose hands a common carrier may

Rep. 26, 3 Dist. Rep. 654 (case of injunction allowed to stand to restrain planting pole in front of door or window of plaintiff).

West Virginia: Maxwell v. Central District & Printing Teleg. Co., 51 W. Va. 121, 41 S. E. 125, 8 Am. Elec. Cas. 209.

⁷⁹ Edgerton v. Chicago, Rock Island & Pac. Ry. Co., 240 Ill. 311, 88 N. E. 808. The case of Great Western Rd. Co. v. Comas, 33 Ill. 185, is followed.

⁸⁰ At pp. 314, 315.

have received goods for transportation, and it does not concern him to know who is the real owner of the goods.⁸¹

In Texas it is held that the shipper is entitled to recover for injuries to the property covered by his contract with the carrier, for which the latter is liable, notwithstanding the shipper did not own the property.⁸²

But in a case in the Appellate Division of the Supreme Court of New York it is held that the presumption is that the consignee is the owner of goods shipped, but the presumption may be rebutted by the consignor. It was shown that the goods were ordered of a traveling salesman on samples and were made up on such orders by the consignor; that there was no memorandum signed by the consignee; that each package of goods was upwards of fifty dollars in value; that no part of the price had been paid, and that the goods were sent subject to inspection and approval, with the understanding that if the vendees were satisfied upon such inspection, and approved the style, quality, material and price, the goods were to be considered as bought; it was held that the title remained in the consignor so as to entitle him to sue the carrier for conversion, and that delivery to the carrier was not an acceptance by the consignee.⁸³ Where, under the averments of the peti-

⁸¹ *Lloyd v. Haugh & Keenan Storage & Transfer Co.*, 223 Pa. St. 148, 72 Atl. 516.

⁸² *Chicago, Rock Island & Gulf Ry. Co. v. Jones* (Tex. Civ. App., 1909), 118 S. W. 759, citing *Railway Co. v. Smith*, 84 Tex. 348, 19 S. W. 509; *Parks v. Railway Co.* (Tex. Civ. App.), 30 S. W. 708; *Railway Co. v. Barnett* (Tex. Civ. App.), 26 S. W. 783; *Railway Co. v. Klepper* (Tex. Civ. App.), 24 S. W. 568.

⁸³ *Fein v. Weir*, 114 N. Y. Supp. 426, 129 App. Div. 299. In this case the court, per Clarke, J., said: "The right to recover damages against a common carrier is determined by the answer to the question of where the title to the goods delivered to it for carriage remains. The presumption is ordinarily that the consignee is the owner of the goods, but this presumption is rebuttable," citing and considering *Angell on Carriers* (5th ed.), §§ 495, 496, 498; *Schouler on Bailments and Carriers* (3d ed.), § 565; *Krulder v. Ellison*, 47 N. Y. 36; *Sweet v. Barney*, 23 N. Y. 335; *Green v. Clarke*, 12 N. Y. 343; *Price v. Powell*, 3 N. Y. 322. The court then adds: "I am satisfied in the case at bar that no title passed to the vendee; that the vendor had no cause of action against the vendee for the purchase price of the goods in question."

tion, it appeared that the plaintiff had agreed to furnish to parties named certain car loads of coal at a stated place, on board of cars, payment therefor to be made on receipt of the same at the places of destination; that the plaintiff had delivered the coal to the railroad company, on its cars, to be transported accordingly, and that the company refused to deliver the coal to the consignees, but wrongfully confiscated and converted it to its own use; that thirty days had elapsed and the defendant had failed and refused to pay for the coal so taken, although duly demanded in writing, and the petition prayed judgment, etc., it was held that the action could be maintained by the plaintiff upon the causes of action so stated; upon rehearing the court, per Benson, J., said: "It has also been held by many courts in this country that the consignor with whom the contract of shipment is made may maintain an action in such a case for injury to the goods, although he has no property therein," and the motion for a rehearing was denied.⁸⁴

§ 244. Suits by and Against Consignees.

The rule is well established that a consignee may sue in a court of admiralty either in his own name, as agent, or in the name of his principal as he thinks best.⁸⁵

A vessel with a perishable cargo, driven by stress of weather

See also as to presumption of title in consignee and rebuttal thereof, *Wertheimer v. Wells, Fargo & Co.*, 112 N. Y. Supp. 1062.

Goods on approval and rejection by consignee, the consignor has right of action for negligence in transporting. *Chicago & E. I. R. Co. v. Boggs*, 134 Ill. App. 348.

⁸⁴ *St. Louis & San Francisco Rd. Co. v. Stone*, 78 Kan. 505, 510, 97 Pac. 471, 104 Pac. 1067. The court cites *Blanchard v. Page*, 74 Mass. 281; *Spence v. Norfolk, etc., Rd. Co.*, 92 Va. 102, 29 L. R. A. 578; 1 *Hutchinson on Carriers* (3d ed.), 197, 3 *Id.*, §§ 1307-1312, 1320. It was further decided in the principal case: That upon an objection to the evidence under the petition the court committed no error prejudicial to the defendant in holding that the action could be proceeded with on the theory that it was an action on an implied contract, and that the measure of recovery if the plaintiff should show a right to recover was the reasonable value of the property at the time of such appropriation.

⁸⁵ *McKinlay v. Morrish*, 21 How. (62 U. S.) 343, 16 L. ed. 100.

out of her course and into a strange port for repairs, is not liable for such injuries to the cargo as are caused merely by the delay of the voyage and the consignee cannot recover against the vessel for the loss thus occasioned to the cargo without showing some fault, misbehavior, or negligence of the master or crew. If the master was justified in putting into port for repairs—if he used proper diligence in getting the repairs made—if he exerted himself to preserve the cargo under the best advice he could get—and if he was unable to send the cargo forward by another vessel—his conduct is blameless, and the consignee has no claim against the vessel.⁸⁶

It is held in a case in the Federal Court that a consignee may be charged with violating the Elkins Law,⁸⁷ as well as could the consignor, where concessions or rebates are received by him from an interstate carrier's published tariffs, where terminal charges are canceled at the point of destination forming a part of such published tariffs.⁸⁸

⁸⁶ *Collenberg, The*, 1 Black (66 U. S.), 170, 17 L. ed. 89.

⁸⁷ Of February 19, 1903, chap. 708, § 1, 32 Stat. 847; U. S. Comp. Stat., Supp. 1905, p. 599.

⁸⁸ *United States v. Standard Oil Co.* (U. S. D. C.), 148 Fed. 719.

CHAPTER XV

PARTIES CONTINUED

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| § 245. Corporation De Facto May Sue and Be Sued. | Parties Plaintiff in Suits Against Corporation. |
| 246. What Constitutes a Corporation De Facto Generally—Legislative Power to Cure Defective Organization. | § 252. United States as Plaintiff—Right to Recover from Bank—Forgery of Payee's Name on Pension Checks—Internal Revenue Taxes—Action Against Railroads. |
| 247. Collateral Attack—De Facto Corporation—Estoppel to Deny Legal Corporate Existence. | 253. Reorganized or Successor Corporation. |
| 248. Same Subject—Instances. | 254. Same Subject. |
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| 251. State or State Officers as | 257. Banks as Parties Generally. |
| | 258. Suit by Corporation as Taxpayer—Suit by Taxpayer Against Corporation. |

§ 245. Corporation De Facto May Sue and Be Sued.

A corporation must exist as a corporation *de jure* or *de facto* or it has no legal capacity to sue or be sued nor any capacity of any kind.¹ But a *de facto* corporation may sue,² and this applies to an undertaking entered into with one who has

¹ Oroville & Virginia Rd. Co. v. Plumas County, 37 Cal. 354, 360, per Rhodes, J., cited in Martin v. Deets, 102 Cal. 55, 41 Am. St. Rep. 151. See Evenson v. Ellington, 63 Wis. 734.

² Baltimore & Potomac Rd. Co. v. Fifth Baptist Church, 137 U. S. 568, 34 L. ed. 784, 11 Sup. Ct. 185 (actions in the nature of actions on the case for the continuance of a nuisance to the plaintiff's use and enjoyment of its house of public worship, by the noise, smoke, cinders, ashes and vapors from the defendant's adjoining engine house, repair shop and locomotive engines and by the obstruction of access to the plaintiff's building by the defendant's unlawful use of its side track in front of it).

dealt with it as such.³ And where a corporation exists as one *de facto*, and common honesty demands that its debts should be paid it will be held liable therefor and cannot escape liability on the ground that it was never legally organized as a corporation.⁴

A contract may validly exist by the loan of money to a *de facto* corporation where it is believed at the time by all the parties that it was legally incorporated even though it was not a corporation *de jure* and in such case the lender cannot maintain an action for such loan against the members as unincorporated persons.⁵

§ 246. What Constitutes a Corporation De Facto Generally—Legislative Power to Cure Defective Organization.

While persons cannot organize as a corporation *de facto* when they cannot become one *de jure*,⁶ still a defect in the organization of a corporation does not prevent it from being a corporation *de facto*.⁷

But an unconstitutional act of the legislature is not a sufficient basis for a corporation *de facto*. That can exist only in case of a law under which it might have been created *de jure*.⁸

In order to create a corporation *de facto* it is held that substantial compliance with the statutory requirements as to organization is not necessary since a colorable compliance therewith is sufficient.⁹ A corporation may also be a *de facto*

³ Riemann v. Tyroler & Vorarlberger Verein, 104 Ill. App. 413.

⁴ Tulare Irrigation District v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. ed. 773.

⁵ Larned v. Beal, 65 N. H. 184, 23 Atl. 189.

⁶ Evenson v. Ellington, 63 Wis. 734.

⁷ New York, Bridgeport & Eastern Ry. Co. v. Motil, 81 Conn. 466, 71 Atl. 563.

⁸ Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023.

⁹ Johnson v. Schulin, 70 Minn. 303, 73 N. W. 147.

Examine Finnegan v. Noerenberg, 52 Minn. 239, 18 L. R. A. 778; Bibb v. Hall, 101 Ala. 79; Central Agric. & M. Assoc. v. Alabama Gold Life Ins. Co., 70 Ala. 120.

"Counsel for the defendants argue with much force and persuasiveness that they escape liability because they became a corporation *de jure*, and

corporation although it has not fully complied in all respects with the requirements of the statute under which it is organized.¹⁰

in support of this position they cite, among other cases: Wells Co. v. Gastonia Cotton Mfg. Co., 198 U. S. 177, 25 Sup. Ct. 640, 49 L. ed. 1003; Andes v. Ely, 158 U. S. 312, 322, 15 Sup. Ct. 954, 39 L. ed. 996; New Orleans Debenture Redemption Co. v. Louisiana, 180 U. S. 320, 327, 21 Sup. Ct. 378, 45 L. ed. 550; Gartside Coal Co. v. Maxwell (C. C.), 22 Fed. 197; Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147; Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch. App.), 56 S. W. 35; Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Merchants' National Bank v. Stone, 38 Mich. 779; Gow v. Collin Lumber Co., 109 Mich. 45, 66 N. W. 676, 678; Eaton v. Aspinwall, 19 N. Y. 119; Leonardsville Bank v. Willard, 25 N. Y. 574; Cahall v. Citizens' Mutual Bldg. Assn., 61 Ala. 232; Fay v. Noble, 7 Cush. (Mass.) 188, 192, 193; Snider Sons' Co. v. Troy, 91 Ala. 224, 8 So. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; Cochran v. Arnold, 58 Pa. 399, 404; Lafflin & Rand Powder Co. v. Sinsheimer, 46 Md. 315, 321, 24 Am. St. Rep. 522; Rutherford v. Hill, 22 Oreg. 218, 99 Pac. 946, 17 L. R. A. 549, 29 Am. St. Rep. 596. But in every one of these authorities articles of incorporation had been filed under a general enabling act, or a charter had been issued and there had been a user of the franchise of the supposed corporation which had been colorably created by the filing of the articles or the issue of the charter before the indebtedness in question was created, while nothing of this nature had been done before the debt for the \$4,700 which we are now considering was incurred. The authorities which have been recited rest upon the proposition that where parties procure a charter or file articles of association under a general law, thereby secure the color of a legal incorporation, believe that they are a corporation and use the supposed franchise of the corporation in good faith, and third parties deal with them as a corporation, they become a corporation *de facto* and exempt from individual liability to such third parties, although there are unknown defects in the proceedings for their incorporation." *Harrill v. Davis* (U. S. C. C. A.), 168 Fed. 187, 191, per Sanborn, Cir. J.

¹⁰ *Marsh v. Mathias*, 19 Utah, 350, 56 Pac. 1074, 11 Am. & Eng. Corp. Cas. (N. S.) 532.

When corporation is one de facto; what constitutes, see the following cases:

United States: Baltimore & Potomac Rd. Co. v. Fifth Baptist Church, 137 U. S. 568, 34 L. ed. 784, 11 Sup. Ct. 185 (holding that at the trial of an action of tort upon a plea of *nul tiel corporation*, evidence that the plaintiff, after filing a defective certificate of incorporation under a general corporation law, acted for years as a corporation, and recovered a judgment as such in a similar action against the defendant without any objection made to its capacity to sue, is sufficient and competent to prove it a corporation *de facto* and entitled to maintain the action); *Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co.* (U. S. C. C.), 82 Fed. 642 (when consolidated corporation of several States is one *de facto*).

The right to sue a railroad corporation is held not to rest as a condition precedent upon compliance with statutory requirements as to obtaining the certificate of railroad commissioners and the prepayment of an organization tax, even though specified as prerequisites to the exercise of corporate powers.¹¹

When a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to an organization, and make a *de jure* out of what was before only a *de facto* corporation.¹² Again, even if a defect exists in

Alabama: Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 So. 81, 90 Am. St. Rep. 907; Harris v. Gateway Land Co., 128 Ala. 652, 29 So. 611.

Connecticut: Mackay v. New York, New Haven & Hartford R. R. Co., 82 Conn. 73, 72 Atl. 583, 586.

Dakota: Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189 (evidence held sufficient to establish a corporation *de facto*).

Georgia: Brown v. Atlanta Ry. & Power Co., 113 Ga. 462, 468, 39 S. E. 71, per Cobb, J.

Illinois: Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167; Lincoln Park Chapter, R. A. M. No. 177, v. Swatek, 105 Ill. App. 604, aff'd in 204 Ill. 228, 68 N. E. 429; Joliet, The, v. Frances, 85 Ill. App. 243; Edwards v. Cleveland Dryer Co., 83 Ill. App. 643.

New Jersey: McCarter v. Ketcham, 72 N. J. L. 247, 62 Atl. 693.

Ohio: State v. Toledo & Lucas County Burial Assoc., 28 Ohio Cir. Ct. R. 397; Shawnee & Sav. Bank Co. v. Miller, 24 Ohio Cir. Ct. R. 198.

Oregon: United States Mortgage Co. v. McClure, 42 Oreg. 190, 70 Pac. 543 (what is *prima facie* of existence).

South Dakota: Mason v. Stevens, 16 S. Dak. 320, 92 N. W. 424.

Tennessee: Tennessee Automatic Lighting Co. v. Massey (Tenn. Ch. App., 1899), 56 S. W. 35.

Wisconsin: Gilman v. Druse, 111 Wis. 400, 87 N. W. 557; Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324.

When corporation is not one *de facto*, see Duke v. Taylor, 37 Fla. 64, 19 So. 172, 3 Am. & Eng. Corp. Cas. (N. S.) 261, 31 L. R. A. 484; Middle Branch Mut. Telephone Co. v. Jones, 137 Iowa, 396, 115 N. W. 3; Louisiana Nat. Bank v. Henderson, 116 La. 413, 40 So. 779; Card v. Moore, 74 N. Y. Supp. 18, 68 App. Div. 327, aff'd in 173 N. Y. 598, 66 N. E. 1105; Whaley v. Bankers' Union (Tex. Civ. App., 1905), 88 S. W. 259.

Essentials to constitute corporation de facto, see Stanwood v. Sterling Metal Co., 107 Ill. App. 569.

¹¹ Muehlenbeck v. Babylon & N. S. R. Co., 55 N. Y. Supp. 1023, 26 Misc. 136.

¹² Commanche County v. Lewis, 133 U. S. 198, 33 L. ed. 604, 10 Sup. Ct. —.

proceedings for an incorporation, the defect may be cured by subsequent legislation.¹³

§ 247. Collateral Attack—De Facto Corporation—Estoppel to Deny Legal Corporate Existence.

It may be generally stated here that a *de facto* corporation cannot be made the subject of a collateral attack in a private suit, and can only be questioned in a direct proceeding brought for that purpose.¹⁴

¹³ *Smith v. Haven's Relief Fund Society*, 103 N. Y. Supp. 770, 118 App. Div. 678, aff'd in (mem.) 190 N. Y. 557, 83 N. E. 1132. See also *Brown v. Atlanta Railway & Power Co.*, 113 Ga. 642, 39 S. E. 71.

¹⁴ *United States: Miller v. Perris Irrig. Dist.* (U. S. C. C.), 85 Fed. 693; *Louisville Trust v. Louisville, Nashville, A. & C. R. Co.* (U. S. C. C. A.), 84 Fed. 539, 56 U. S. App. 208, 28 C. C. A. 202; *Continental Trust Co. v. Toledo, St. Louis & K. C. R. Co.* (U. S. C. C.), 82 Fed. 642. See *Harrill v. Davis* (U. S. C. C. A.), 168 Fed. 187.

Alabama: First Nat. Bank v. Henry (Ala., 1906), 49 So. 97; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 31 So. 81, 90 Am. St. Rep. 907; *Harris v. Gateway Land Co.*, 128 Ala. 652, 29 So. 611.

California: California Cured Fruit Ass'n v. Stellings, 141 Cal. 713, 75 Pac. 320; *Raphael Weill & Co. v. Crittenden*, 139 Cal. 488, 73 Pac. 238; *People v. Linda Vista Irrig. Dist.*, 128 Cal. 477, 61 Pac. 86; *Los Angeles Holiness Band v. Spires*, 126 Cal. 541, 58 Pac. 1049.

Connecticut: Fish v. Smith, 73 Conn. 377, 47 Atl. 711.

Delaware: Wilmington, City of, v. Addicks, 7 Del. Ch. 56, 8 Del. Ch. 310, 43 Atl. 297.

Illinois: Gillette v. Aurora Ry.'s Co., 228 Ill. 261, 81 N. E. 1005 (rule stated but qualified in the case of the power of a railroad corporation to condemn land); *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569; *Lincoln Park Chapter, R. A. M. No. 177, v. Swatek*, 105 Ill. App. 604, aff'd in 204 Ill. 228, 68 N. E. 429.

Indiana: Clark v. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083; *Baker v. Neff*, 73 Ind. 68; *Cleveland, C. C. & St. Louis Ry. Co. v. Feight*, 41 Ind. App. 416, 84 N. E. 15.

Kansas: Short, In re, 47 Kan. 250, 27 Pac. 1005.

Maine: Seven Star Grange, Patrons of Husbandry No. 73, v. Ferguson, 98 Me. 176, 56 Atl. 648. See *Taylor v. Portsmouth, K. & Y. St. Ry. Co.*, 91 Me. 193, 39 Atl. 560, 64 Am. St. Rep. 216.

Nebraska: Otoe County Fair & Driving Assoc. v. Doman, 1 Neb. Unoff. 179, 95 N. W. 327.

New Jersey: Bell v. Pennsylvania, S. & N. E. R. Co., 10 N. J. L. 336.

New York: Geneva Mineral Springs Co. v. Coursey, 61 N. Y. Supp. 98.

Pennsylvania: Monongahela Bridge Co. v. Pittsburgh & B. Traction Co., 196 Pa. St. 25, 46 Atl. 99, 79 Am. St. Rep. 685.

The facts necessary to constitute a corporation *de facto* may, however, be required to be shown.¹⁵

And as there cannot be a *de facto* corporation where there cannot be one *de jure*, then, if there is no law under which a corporation *de jure* can exist, there may be a collateral attack upon the existence of a *de facto* corporation.¹⁶

Again, the law that corporate existence cannot be inquired into, except by judicial proceedings in the name of the State, does not apply to a pretended but not even a *de facto* corporation.¹⁷

The rule which precludes a collateral attack upon corporate existence is founded in public policy and is not to be so applied as to defeat the assertion of just legal rights by parties in the courts. It is said that it is essential to the doctrine that there be in existence a law by virtue of which a corporation might legally exist and "that the rule is the same where there is only an unconstitutional law." Even this qualification of the rule seems to be subject to the exceptions applicable in cases where the attacking party sustains certain relations to the alleged corporation or has no right of his own to be protected by allowing the inquiry.¹⁸

Although the doctrine precluding a collateral attack upon

Wisconsin: Gilman v. Druse, 111 Wis. 400, 87 N. W. 557.

¹⁵ *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569.

¹⁶ *Clark v. American Cannel Coal Co.*, 165 Ind. 213, 73 N. E. 1083. See also *Imperial Building Co. v. Chicago Open Board of Trade*, 238 Ill. 100, 87 N. E. 167, distinguishing *Patterson v. Northern Trust Co.*, 230 Ill. 341, 82 N. E. 837, and 231 Ill. 28, 82 N. E. 840, 121 Am. St. Rep. 299.

See as to first point in text the following cases:

United States: *Davis v. Stevens* (U. S. D. C.), 104 Fed. 235.

Colorado: *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143.

Georgia: *Brown v. Atlanta Ry. & Power Co.*, 113 Ga. 462, 468, 39 S. E. 71, per Cobb, J.

Michigan: *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

Texas: *McLeary v. Dawson*, 87 Tex. 524, 29 S. W. 1044.

¹⁷ *Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031, 1135, 115 Am. St. Rep. 1023, 3 L. R. A. (N. S.) 653.

¹⁸ *Parks v. West* (Tex., 1908), 111 S. W. 726. The court, per Williams, J., said: "But it is urged that the attack of plaintiffs is upon the corporate existence of the Mertins school district in a collateral proceeding, and that the validity of such incorporation can be questioned only by the State in a

corporate existence is often applied to *de facto* corporations, or is usually applied by reason of some defect or irregularity in organization, still the circumstances surrounding the dealing or contracting with a corporation may be such, or the attacking party may sustain such a relation to the corporation as to create an estoppel and preclude, in a suit between the corporation and a private party, the denial of corporate existence, or the setting up an irregularity or defect in corporate organization.¹⁹

direct proceeding. Such a proposition is often applied in favor of *de facto* corporations, and it is sometimes difficult to determine its exact scope and application. *El Paso v. Ruckman*, 92 Tex. 86, 46 S. W. 25; *Brennan v. City of Weatherford*, 53 Tex. 331, 37 Am. St. Rep. 758; *Graham v. City of Greenville*, 67 Tex. 62, 2 S. W. 742. Usually it is applied where the attack is because of some defect in organization under a law by virtue of which such a corporation could lawfully exist. Sometimes the attacking party sustains such relation to the corporation as to estop him from questioning its corporate existence and there are other cases in which it is not essential to the protection of any right of his that inquiry should be made into the validity of the incorporation."

¹⁹ *United States*: *Chubb v. Upton*, 95 U. S. 665, 24 L. ed. 523 (cited in *Bailey v. Tillinghast*, 99 Fed. 808; *First Nat. Bank of Concord v. Hawkins*, 79 Fed. 52; *Laredo Imp. Co. v. Stevenson*, 66 Fed. 636), compare *McCormick v. Market Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 995, 41 L. ed. 817 [a case of absence of authority of a national bank to commence banking business and the invalidity of a lease; not made good by estoppel (cited in *Seeberger v. McCormick*, 175 U. S. 274, 278, 44 L. ed. 161, 20 Sup. Ct. 128; *De la Vergne Refrigerating M. Co. v. German Sav. Inst.*, 175 U. S. 40, 59, 20 Sup. Ct. 20, 44 L. ed. 65; *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 371, 19 Sup. Ct. 739, 43 L. ed. 1007; *California Bank v. Kennedy*, 167 U. S. 362, 367, 42 L. ed. 198, 17 Sup. Ct. 831; *East St. Louis Connecting Ry. Co. v. Jarvis*, 92 Fed. 744)]; *Western Bank & Trust Co., In re* (U. S. D. C.), 163 Fed. 713; *Rannels v. Rowe*, 145 Fed. 296; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762, aff'd 132 Fed. 641; *W. L. Wells Co. v. Avon Mills*, 118 Fed. 190, aff'd 148 Fed. 1018, s. c., 198 U. S. 177, 40 L. ed. 1003, 25 Sup. Ct. 640; *Deitch v. Staub*, 115 Fed. 309; *American Alkali Co. v. Campbell*, 113 Fed. 398; *Manship v. New South Bldg. & Loan Assoc.*, 110 Fed. 845; *Cunningham v. City of Cleveland*, 98 Fed. 657, 39 C. C. A. 211, s. c., 127 Fed. 667, s. c., 152 Fed. 908; *Millar v. Ferris Irrig. District*, 85 Fed. 693.

Alabama: *Greenville, City of, v. Greenville Waterworks Co.*, 125 Ala. 625, 27 So. 764.

California: *Truckee & Tahoe Turnpike R. Co. v. Campbell*, 44 Cal. 89.

Colorado: *Plummer v. Struby-Estabrooke Mercantile Co.*, 23 Colo. 190, 47 Pac. 294.

Georgia: *Collins v. Citizens' Bank & Trust Co.*, 121 Ga. 513, 49 S. E. 594;

The fact, however, that a plaintiff has, in a previous suit, recognized defendants as forming a company, without any reference to its having been regularly incorporated, is not

Etowah Milling Co. v. Crenshaw, 116 Ga. 406, 42 S. E. 709; *Petty v. Brunswick & Western Ry. Co.*, 109 Ga. 666, 35 S. E. 82.

Illinois: *Dubs v. Egli*, 167 Ill. 514, 47 N. E. 766; *Smith v. Mayfield*, 163 Ill. 447, 45 N. E. 157; *Eggert v. Cleveland*, 138 Ill. App. 434; *Spreyne v. Garfield Lodge of United Slavonian Benev. Soc.* No. 1, 117 Ill. App. 253.

Iowa: *State Security Bank v. Hoskins*, 130 Iowa, 339, 106 N. W. 764; *Seaton v. Grimm*, 110 Iowa, 145, 81 N. W. 225; *Grand Lodge Ancient Order U. W. v. Graham*, 96 Iowa, 592, 65 N. W. 837, 31 L. R. A. 133.

Kentucky: *Tanner v. Nichols*, 25 Ky. L. Rep. 2191, 80 S. W. 225. See *Calor Oil & Gas Co. v. Franzell*, 33 Ky. L. Rep. 98, 109 S. W. 328.

Louisiana: *Pattison v. Gulf Bag Co.*, 116 La. 963, 41 So. 224.

Maine: *Seven Star Grange, Patrons of Husbandry No. 73, v. Ferguson*, 98 Me. 176, 56 Atl. 648; *Taylor v. Portsmouth, K. & Y. Street R. Co.*, 91 Me. 193, 39 Atl. 560.

Michigan: *Niles, City of, v. Benton Harbor, St. Joe Ry. & Light Co.*, 154 Mich. 378, 15 Det. Leg. N. 757, 117 N. W. 937; *Gow v. Collin & P. Lumber Co.*, 109 Mich. 45, 66 N. W. 676, 3 Am. & Eng. Corp. Cas. (N. S.) 615, 2 Det. L. N. 1007. See *Wyandotte Electric Light Co. v. City of Wyandotte*, 124 Mich. 43, 7 Det. Leg. N. 1111, 82 N. W. 821.

Minnesota: *Hause v. Mannheimer*, 67 Minn. 194, 69 N. W. 810, 5 Am. & Eng. Corp. Cas. (N. S.) 619.

Mississippi: *Johnston v. Gumbel (Miss.)*, 19 So. 100.

Missouri: *West Missouri Land Co. v. Kansas City S. B. Co.*, 161 Mo. 595, 61 S. W. 847. See *School District v. Hodgin*, 180 Mo. 70, 79 S. W. 148.

Nebraska: *Crete Building & Loan Assoc. v. Patz (Neb., 1901)*, 95 N. W. 793; *Otoe County Fair & Driving Park Assoc. v. Doman*, 1 Neb. Unoff. 179, 95 N. W. 327; *Livingston Loan & Bldg. Assoc. v. Drummond*, 49 Neb. 200, 68 N. W. 375; *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109, 68 N. W. 370.

New Jersey: *Campbell v. Perth Amboy Ship-Building & Engineering Co.*, 70 N. J. Eq. 40, 62 Atl. 319, aff'd in 71 N. J. Eq. 302; *Bell v. Pennsylvania, S. & N. E. R. Co. (N. J.)*, 10 Atl. 741.

New Mexico: *Palatine Ins. Co., Ltd., of Manchester, Eng., v. Santa Fe Mercantile Co. (N. M., 1905)*, 82 Pac. 363.

New York: *Green v. Grigg*, 90 N. Y. Supp. 565, 98 App. Div. 445; *United Growers Co. v. Eisner*, 47 N. Y. Supp. 906, 22 App. Div. 1, 15 Nat. Corp. Rep. 661.

Ohio: *Hatry v. Painesville & Y. Ry. Co.*, 1 Ohio C. D. 238; *Lattimer v. Mosaic Glass Co.*, 13 Ohio C. C. 163.

Oregon: *Hackett v. Wilson*, 12 Oreg. 25, 6 Pac. 652.

Pennsylvania: *Monongahela Bridge Co. v. Pittsburg & Birmingham Traction Co.*, 196 Pa. St. 25, 46 Atl. 99; *Commonwealth v. Philadelphia County*, 193 Pa. St. 236, 44 Atl. 336; *Twelfth St. Market Co. v. Philadelphia & Reading R. Co.*, 142 Pa. St. 580, 581, 21 Atl. 989; *Goodbread v. Philadelphia, B. & B. M. Turnp. Co.*, 15 Mont. Co. L. Rep. 21; *Olyphant Sewage-*

taining an action against said company to recover taxes.⁴⁸ And where the right to maintain an obstruction in the streets, even though placed there with the city's permission, is to be tested as a public injury, the action should be brought by the city or its proper representative.⁴⁹

§ 252. United States as Plaintiff—Right to Recover from Bank—Forgery of Payee's Name on Pension Checks—Internal Revenue Taxes—Action Against Railroads.

The United States can recover from a bank presenting pension checks to, and receiving the money from, a subtreasury, where the names of the payees have been forged; and the right to recover is not conditioned upon either demand or the giving of notice of the discovery of facts which by the operation of the legal warranty were presumably within the knowledge of the bank. The United States is not chargeable with the knowledge of the signatures of the vast numbers of persons entitled to receive pensions, and the exceptional rule as to certain classes of commercial paper that the person having knowledge of the genuine signature of the payee whose signature is forged is negligent in paying on such an indorsement and therefore cannot recover, does not apply to the United States in regard to pension checks.⁵⁰

Where under the statute⁵¹ taxes "may be sued for and recovered in the name of the United States in any proper form of action" the United States may bring an action of debt or adopt any other common-law remedy to collect what is due to it for taxes imposed by law upon a bank and for which the bank is a debtor in the sum prescribed.⁵²

⁴⁸ *Western Union Teleg. Co. v. State*, 146 Ind. 54, 44 N. E. 793; Ind. Rev. Stat., 1894, § 8488.

⁴⁹ *Chicago Telephone Co. v. Northwestern Telephone Co.*, 100 Ill. 57, aff'd in 199 Ill. 324, 65 N. E. 329.

⁵⁰ *United States v. National Exchange Bank of Providence*, 214 U. S. 302, 53 L. ed. 1006, 29 Sup. Ct. 665.

⁵¹ Internal Revenue Law, act of July 13, 1866.

⁵² *Dollar Savings Bank v. United States*, 19 Wall. (86 U. S.) 227, 22 L. ed. 80.

The act of Congress of 1873⁵³ is a valid and constitutional exercise of legislative power. Congress, by requiring the attorney-general to bring a suit in equity in the name of the United States in any Circuit Court against the Union Pacific Railroad Company and others, intended, not to change the substantial rights of the parties to the suit, but to provide a specific mode of procedure, which, by removing certain restrictions on the jurisdiction, process, and pleading which are in other cases imposed, would give a larger scope to the action of the court, and a more economical and efficient remedy than before existed.⁵⁴

§ 253. Reorganized or Successor Corporation.

A new corporation may sue in its own name without making the stockholders parties upon a demand against a judgment creditor held by the old company which it was intended the new company should sue on, any excess recovered over the claim of said creditor against the old company to go by agreement to the old stockholders. The judgment in question here had been obtained before the reorganization, and, in view of contemplated litigation with the judgment creditor, the purchase note given by the new stockholders was deposited with a trustee for the purpose of indemnifying the reorganized company against any loss which might be sustained by it on account of said contemplated litigation.⁵⁵ And where stockholders have the same interest in the new corporation as in the old and there exists no new consideration they cannot by forming such new corporation and transferring to it the property of the old company thereby release themselves from liability to the vendor for the value of property obtained by the latter corporation in its corporate name on credit.⁵⁶

One who owns stock in a railroad corporation and delivers

⁵³ Act of March 3, 1873, 17 Stat. 509.

⁵⁴ *United States v. Union Pac. R. R. Co.*, 98 U. S. 569, 25 L. ed. 143, 140 Sup. Ct. 62.

⁵⁵ *St. Francis Electric Light Co. v. Electric Supply Co.*, 69 Ark. 174, 61 S. W. 912.

⁵⁶ *Hancock v. Holbrook*, 40 La. Ann. 53, 3 So. 351.

it, for the purpose of reorganization, to a committee whose discretion as to the disposition and use of the new corporation's securities is absolute, is obligated, in order to maintain a suit against such committee for breach of trust in relation to the purchase of securities and the delivery of preferred stock to noteholders and for commissioners, to show that the said acts were not warranted and that the preservation of the value of his holding requires that the alleged wrongful acts should cease, and the entire acts of the committee should be shown.⁵⁷

If a reorganization of a corporation into a foreign one has been brought about without the consent of a stockholder he can maintain an action against the original corporation, such reorganization not being void on its face but voidable; but, since the foreign corporation is not made a party, although a necessary one to any decree of restitution, the most relief which can be afforded is the annulling of the action of the original corporation.⁵⁸

The rules of pleading in equity are more elastic than in actions at law, and where the plaintiff in equity knows that a third person claims an interest in the subject-matter but does not know the nature, extent or merit of the claim, these facts may be stated and the claimant made a defendant and required to disclose his alleged interest. Thus, where a stockholder suing members of a reorganization committee in equity for waste and misapplication of securities deposited with them, shows that a trust company, the original depositary, had received certain securities but was superseded as depositary by a new trust company, to which it delivered the securities, and alleges on information and belief that the original depositary assisted the members of the reorganization committee in misappropriating and wasting the property of the plaintiff's corporation and shared in the profits so made, there is sufficient to put the first depositary to an answer and explanation. And where such complaint alleges positively that an individual, made defendant, signed the reorganization agreement, he

⁵⁷ *Venner v. Fitzgerald* (U. S. C. C.), 91 Fed. 335.

⁵⁸ *Farish v. Cieneguita Copper Co.* (Ariz., 1909), 100 Pac. 781.

should be required to answer, although his name does not appear among the parties to the agreement, the actual signatures thereto not being printed in the case.⁵⁹

§ 254. Same Subject.

A new corporation cannot be considered as a continuation of the original one and liable at law for its debts even though composed of the officers and stockholders of the old corporation where it has acquired the latter's property and assets by purchase at judicial sales; and this applies irrespective of whatever might be the new corporation's liability in equity to the creditors of the original corporation had the transfers of property been fraudulent.⁶⁰ A railroad company is not liable for

⁵⁹ *Mawhinney v. Bliss*, 124 App. Div. 609, 109 N. Y. Supp. 332. The statement of facts in this case is as follows (per Houghton, J.): "The action is brought by the plaintiff as a stockholder against certain members of the reorganization committee under a reorganization agreement respecting the American Cotton Company and other subsidiary corporations. A demurrer to the complaint by one of the committee was considered by this court under the title of *Mawhinney v. Bliss*, 117 App. Div. 255, 102 N. Y. Supp. 279, *aff'd* 189 U. S. 801, 81 N. E. 1169, where the general facts alleged are fully stated, rendering a further statement unnecessary.

"The Bankers' Trust Company, one of the present appellants, was the depository of the securities under the reorganization agreement, and it demurs on the principal ground that the complaint states no cause of action against it. The complaint shows that the Bankers' Trust Company was the original depository, and received certain stocks and securities; but it further alleges that it was superseded by the Metropolitan Trust Company as depository, and that it delivered to its successor all the certificates of stock and other corporate securities which had been deposited with it. The only other allegation of the complaint connecting the Bankers' Trust Company with the acts complained of is on information and belief that it assisted the individual members of the reorganization committed in misappropriating or wasting the money and property of the American Cotton Company, and shared in the profits so made by them. The allegation respecting the misappropriation and wasting of the assets of the corporation by these individuals is upon information and belief, with an express statement that plaintiff has no knowledge of the amount of money or what property was so mismanaged or wasted."

⁶⁰ *Armour v. E. Bement's Sons* (U. S. C. C. A.), 123 Fed. 56.

As to extent of liability or duties of reorganized or successor corporation, see the following cases:

United States v. Barkley v. Levee Commissioners, 93 U. S. 258, 23 L. ed. 893 (obligations of successor of public corporation); *American Creosote*

the torts or contracts of its predecessor merely because it has purchased or is operating a railway line of another company; it must in such case be charged by law with the liability or obligation, or it must have assumed the same, and this applies to a breach of contract which the other company had entered into.⁶¹ Although a creditor may have a right to follow in equity the assets of an old corporation to whose assets and business a new corporation has succeeded, still, in the absence of a novation, the latter corporation cannot be held liable in an action at law for the old corporation's debts when it has not assumed the same.⁶² Where a corporation is embarrassed and agrees upon a plan to reorganize whereby its debts are to be satisfied by bonds to be issued, and before such agreement for reorganization is executed there is a disputed understanding to the effect that payment was to be in cash, a creditor of the

Works v. C. Lembeke & Co. (U. S. C. C.), 165 Fed. 809; *Kittel v. Augusta, T. & G. R. Co.* (U. S. C. C.), 78 Fed. 855 (when railroad corporation not liable; case of property sold under execution and transferred; transferee had nothing to do with proceeds); *Glidden & J. Varnish Co. v. Interstate Nat. Bank* (U. S. C. C. A.), 69 Fed. 912, 16 C. C. A. 534, 32 U. S. App. 654.

Indiana: Louisville N. A. & C. R. Co. v. Boney, 117 Ind. 501, 3 L. R. A. 435.

Louisiana: Charity Hospital v. New Orleans Gas Light Co., 40 La. Ann. 382.

Massachusetts: Aldridge v. Fore River Shipbuilding Co., 201 Mass. 131, 87 N. E. 485; *Day v. Worcester, N. & R. R. Co.*, 151 Mass. 302.

Minnesota: Plainview v. Winona & St. P. Rd. Co., 36 Minn. 505.

Nebraska: Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 68 N. W. 628, 35 L. R. A. 444, 5 Am. & Eng. Corp. Cas. (N. S.) 382.

New York: Pohhemus v. Fitchburg Rd. Co., 123 N. Y. 502, 26 N. E. 31, 46 Am. & Eng. R. Cas. 330, 43 Alb. L. J. 149, 9 R. R. & Corp. L. J. 149, 50 Hun, 397, 20 N. Y. St. Rep. 117; *Baker v. Appleton & Co.*, 95 N. Y. Supp. 125, 107 App. Div. 358, aff'd in (mem.) 187 N. Y. 548, 80 N. E. 1104; *Ferguson v. Ann Arbor Rd. Co.*, 45 N. Y. Supp. 172, 17 App. Div. 336; *Fernschild v. D. G. Yuengling Brew. Co.*, 40 N. Y. Supp. 1119, 18 Misc. 49; *Janes v. Fitchburg R. Co.*, 50 Hun (N. Y.), 310.

Pennsylvania: Campbell v. Pittsburgh & W. Rd. Co., 137 Pa. St. 574.

Virginia: Supreme Lodge Knights of P. v. Weller, 93 Va. 605, 25 S. E. 891, 5 Am. & Eng. Rd. Cas. (N. S.) 376.

⁶¹ *Seaboard Air Line Ry. Co. v. Leader*, 115 Ga. 702, 42 S. E. 38.

⁶² *Ewing v. Composite Brake-Shoe Co.*, 169 Mass. 72, 47 N. E. 241, 7 Am. & Eng. Corp. Cas. (N. S.) 181.

corporation cannot maintain a suit against the committee of reorganization to recover such claimed cash payment.⁶³

§ 255. Same Subject.

If a contract exists whereby the corporation purchasing the assets of another corporation is to pay the latter's debts the vendee corporation may be sued at law by a creditor of the vendor.⁶⁴ And where a new corporation is organized to cure defects in the organization of an old *de facto* corporation and takes the property and assumes the obligations of the old company it will be liable upon a judgment obtained against the latter subsequent to such reorganization.⁶⁵

Where the articles of a fire insurance company are defective and a new mutual company, with the same name, is organized for the purpose of obviating such defects, and it acquires the assets of, and continues in force the policies of the old company, in case the members do not elect to take out new policies, and practically the same officers and members are retained, such new company will be held liable upon a policy issued by the old company on the same basis as if it had itself issued it.⁶⁶ In case of success in form, of an attempt to reorganize a mutual insurance company on the stock plan under a law, in terms authorizing it, the insurance business formerly carried on by the old company being continued ostensibly by the new creation, using the former's assets and good will, if the attempt is fruitless because of the enabling act being void such continued business is to be regarded as really that of the old corporation; as belonging to it.⁶⁷

A corporation which succeeds another in its business, purchases all its property and assets and assumes its liabilities and contracts may hold liable in equity an assignee of a con-

⁶³ Glens Falls Paper Mill Co. v. Trask, 51 N. Y. Supp. 977, 29 App. Div. 449, aff'd in 164 N. Y. 604, 58 N. E. 1087.

⁶⁴ Central Electric Co. v. Sprague Electric Co. (U. S. C. C. A.), 120 Fed. 925, 57 C. C. A. 97.

⁶⁵ Calumet Paper Co. v. Stotts Investment Co., 96 Iowa, 147, 64 N. W. 782.

⁶⁶ Benesh v. Mill Owners' Mut. F. Ins. Co., 103 Iowa, 465, 72 N. W. 674.

⁶⁷ Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 115 Am. St. Rep. 1023, 3 L. R. A. (N. S.) 653.

tract constituting part of the assets and it is not necessary that the assignor should be made a party to the suit.⁶⁸

A bondholder of an insolvent corporation who is a party to a reorganization agreement cannot have the aid of a court of equity in compelling a committee of reorganization, authorized to act by the bondholders, to deliver to him new bonds of the reorganized company until he has placed himself on an equality with the other bondholders by repaying money which he has collected on matured coupons, detached by him, before depositing his bonds in accordance with the plan of reorganization for the purpose, as agreed, of paying for the property of the old company upon foreclosure and purchase thereof.⁶⁹

§ 256. Levee Districts or Levee Boards Whether Public or Private Corporations May Sue and Be Sued.

Under a Federal decision a levee district is a public corporation with power to sue and be sued even though a statute creating a board of levee inspectors with powers usually incident to such corporations does not expressly declare it to be a corporation.⁷⁰ So a levee board may be a corporation with large discretionary powers as a fiduciary agent to carry out public purposes, such as the power to aid in building levees, or other works of public improvement; and it may also possess authority to sue.⁷¹ It is also held that a levee district board exercises only public duties and functions and cannot be sued outside of the State.⁷² In Illinois a board of directors appointed by statute to locate and superintend the construction of a levee, with power to contract, sue and be sued, under a specified name, is strictly a private corporation.⁷³

⁶⁸ *Dancel v. Goodyear Shoe Mfg. Co.* (U. S. C. C.), 137 Fed. 157, *aff'd* in 144 Fed. 679, s. c., 202 U. S. 619.

⁶⁹ *Fuller v. Venable* (U. S. C. C. A.), 118 Fed. 543, 55 C. C. A. 309.

⁷⁰ *Board of Levee Inspectors of Chicot County v. Crittenden*, 94 Fed. 613.

⁷¹ *Louisiana, A. & M. R. Co. v. Tensas Basin Levee Dist. Commrs.*, 87 Fed. 594, 31 C. C. A. 121, 58 U. S. App. 281.

⁷² *Board of Directors of St. Francis Levee Dist. v. Bodkin* (Tenn.), 69 S. W. 270.

⁷³ *Board of Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318, 322.

§ 257. Banks as Parties Generally.

In an early case in the Federal Supreme Court where a bank had become insolvent and had made an assignment of its effects to trustees for the benefit of its creditors, it was allowed to sue in its own name at the instance and for the benefit of creditors, and the case was held to be the same as if the law permitted the suit to be brought and the same had been brought in the name of such trustees.⁷⁴ But where the charter of a bank is repealed and a provision made for the distribution of its funds by a receiver the bank is thereby incapacitated to any longer sue or be sued in a court of law, otherwise than to promote the objects confided to the receivers.⁷⁵ Where money was borrowed from a bank upon a promissory note, signed by the principal and two sureties, and the principal debtor, by way of counter security conveyed certain property to a trustee for the purpose of indemnifying his sureties it is necessary to make the trustee and the *cestui que trust* parties to a bill filed by the bank, asserting a special lien upon the property thus conveyed. But where the principal debtor had made a fraudulent conveyance of the property, which had continued in his possession, after the execution of the trust deed, and then died, a bill is good, which was filed by the bank against the administrators, for the purpose of setting aside the fraudulent conveyance, and bringing the property into the assets of the deceased, for the benefit of all the creditors who might apply.⁷⁶

Although a bank is the equitable owner of property as against its cashier who has purchased personal property in his own name upon a consideration moving from the bank still where the cashier replevies such property the bank is not a necessary party.⁷⁷

⁷⁴ *Lyman v. United States Bank* (1851), 12 How. (53 U. S.) 225, 13 L. ed. 965.

The act of incorporation of the Bank of the United States gave the Federal Circuit Courts jurisdiction of suits by and against the bank. *Osborn v. United States Bank* (1824), 9 Wheat. (22 U. S.) 738, 6 L. ed. 204.

⁷⁵ *Whitman v. Cox*, 26 Me. 335.

⁷⁶ *McRea v. Bank of Alabama*, 19 How. (60 U. S.) 376, 15 L. ed. 688.

⁷⁷ *Church v. Foley*, 10 S. Dak. 74, 71 N. W. 759.

§ 258. Suit by Corporation as Taxpayer—Suit by Taxpayer Against Corporation.

A corporation may, as taxpayer, sue to enjoin the breaking up of a street pavement, done without legal authority.⁷⁸

If a trolley company is illegally constructing its road, a taxpayer may take action against the company to restrain it, and need not wait therefor, until the assessment is laid.⁷⁹

A taxpayer cannot maintain an action to revise, control, or vacate the acts of a municipal government, except as incidental or subsidiary to the protection of some private right or prevention of some private wrong, or to prevent any wrongful squandering or surrender of the moneys, property, or property rights of the municipality, or when unlawful increase in the burdens of taxation is threatened by the proposed action. Thus, under a State statute providing for the formation, etc., of street railway corporations,⁸⁰ a city was empowered to grant the use of streets and bridges to such corporations upon such terms as the proper authorities should determine. A city, acting under such statute, granted the defendant street railway company a franchise to extend its lines, thus in operation, on certain designated streets, without receiving any money consideration therefor, but in consideration that the company should charge a reduced fare. The company had formerly offered a large sum of money for such franchise, with the right to charge the former fare; and other parties had offered a large sum of money for the additional franchise, but they owned no connecting lines. It was held, that the granting of the franchise was a question addressed to the sound discretion of the common council; and that when it decided that the reduced fares were more desirable for the public, while it might or might not have exercised good discretion, such action could not be called, in any proper or reasonable sense, a

⁷⁸ *Potomac Elect. Power Co. v. United States Elect. L. Co.*, 26 Wash. L. Rep. (Dist. Col.) 19.

⁷⁹ *State, Lewis, v. Board of Freeholders of Cumberland*, 56 N. J. L. 416, 28 Atl. 553.

⁸⁰ Section 1862, Wis. Stat., 1898.

squandering of public funds or property. The owner of property abutting on a street in which it is proposed to construct a street railway under a franchise, conditioned that it should be accepted by the railway company, even though he might be entitled to enjoin the construction of the railway in front of his lot, cannot enjoin the company from accepting the franchise, and thus in effect annul the entire grant.⁵¹

⁵¹ *Linden Land Co. v. Milwaukee Electric Ry. & Light Co.*, 107 Wis. 493, 83 N. W. 851. See § 242, herein.

CHAPTER XVI

PARTIES CONTINUED—RIGHTS AND LIABILITIES—REMEDIES—
PROMOTERS—OFFICERS—DIRECTORS—STOCKHOLDERS

- § 259. Promoters' Duties—Remedy Against Them—Corporate Liability for Acts of, Generally.
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274. When Corporation Should Sue or Be Made Party to Suit by Stockholder.
275. When Stockholder May Be Made Party Defendant by Court—Refusal to Permit Stockholders to Defend.
276. Stockholders as Necessary Parties in Suit by Policy Holder Against Insurance Company for Accounting and Receivership—Equity Jurisdiction.
277. Transfers of Stock—Pledge for Collateral Security—Liability of Pledgee as Stockholder — National Banks—Bailment.

§ 259. Promoters' Duties—Remedy Against Them—Corporate Liability for Acts of, Generally.

Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the shareholders, and are precluded from taking a secret advantage of other shareholders.¹ In a case decided in the New York Court of Appeals, in 1890, the facts were as follows: The defendant B. having acquired, in his own name, but for the joint benefit of himself and the other individual defendants therein, options, giving a right to purchase certain mining property, entered with them into a contract, by the terms of which it was agreed to issue a prospectus and invite subscriptions for the stock of a corporation which it was proposed to organize, in case subscriptions were obtained sufficient to pay for the property; in which case the purchase was to be made and title taken by B. for himself and as trustee for his associates; he to convey to the corporation, receiving therefor the whole capital stock. All that remained of said stock, after delivery to the subscribers, was to be divided between the contracting parties in specified proportions. A prospectus and subscription paper were accordingly issued; the former set forth the terms and conditions upon which the corporation was proposed to be organized, and in it the names of the associates were given as the officers and trustees of the corporation. In the subscription paper H., one of the associates, was named as trustee for the subscribers. The capital stock of the proposed corporation was fixed at one million five hundred thousand dollars, divided into shares of the par value of ten dollars each. The prospectus stated that only a portion of the shares were to be sold at four dollars per share; they were to be fully paid up and nonassessable. Subscriptions having been received from

¹ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 311. See also *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523; *Fred Macey Co. v. Macey*, 143 Mich. 138, 13 Detroit Leg. N. 948, 106 N. W. 722, 5 L. R. A. (N. S.) 1036.

And in order to warrant the interference of a court, in a stockholder's suit, with the internal management of a corporation it must also appear that there will otherwise be a failure of justice.¹⁵

Nor will the internal management of a corporation be interfered with by the court, at the instance of a minority stockholder, unless the majority stockholders are acting without the charter powers, or a strong case of mismanagement, or fraud, is shown.¹⁶ The minority stockholders cannot come into court upon allegations of a want of judgment or lack of efficiency on the part of the majority and change the course of administration. Corporate elections furnish the only remedy for internal dissensions, as the majority must rule so long as it keeps within the powers conferred by the charter.¹⁷ Again, it seems, that as to questions of mere administration, or of policy, as to which there is an honest difference of opinion among the shareholders, the will of the majority should govern, and so the court would not be justified in interfering, even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court when the proposed action is within the corporate powers, a case must be made out which plainly

¹⁵ *Miller v. Murray*, 17 Colo. 408, 30 Pac. 46.

¹⁶ *Barton Lumber Co. v. Enwright*, 131 Ga. 329, 62 S. E. 233. The court, per Holden, J., said: "The right to control the affairs of a corporation is vested by law in its stockholders—those whose pecuniary gain is dependant upon its successful management. The majority stockholders, or the majority of the directors, when directors are chosen to act on behalf of the stockholders, have the right to determine the business policy of the corporation, and the minority must submit to their judgment in such matters, when exercised in good faith and not involving *ultra vires*, or in breach of trust. As was said by this court in *Hand v. Dexter*, 41 Ga. 454, 461, 'The very foundation principle of a corporation is that the majority of its stockholders have the right to manage its affairs, so long as they keep within their charter rights.' No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs."

¹⁷ *Schwab v. Potter Co.*, 194 N. Y. 409, 87 N. E. 670, affirming 113 N. Y. Supp. 439, 129 App. Div. 36.

shows that such action is so far opposed to the true interests of the corporation itself as to necessarily lead to the inference that none thus acting could have been influenced by an honest desire to secure such interests, but that he must have acted with intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests.¹⁸

§ 261. Officers or Directors—Duties and Liabilities of, Generally—Parties.

Although the relation of managing officers of a corporation to a stockholder is not strictly that of trustee and *cestui que trust*, it is in a sense fiduciary, and their superior position imposes upon them a duty to an individual stockholder not to take advantage of the opportunity offered by their position to wrong him by any affirmative act designed to injure. Thus, they may not intentionally abuse their power by actually or apparently depressing the value of stock for the purpose of acquiring it from a stockholder at an undervaluation, and, having so injured a stockholder, it is immaterial that they may also have wronged the corporation. This is true although the stock purchased is that of a private business corporation having no market value.¹⁹

Each director of a corporation is liable only for his own acts or omissions. One director is not liable for the acts or omissions of another unless he participated therein to the injury of the corporation, or had some knowledge by which in the exercise of reasonable care he could have prevented the loss, or unless he connived at it or failed to perform his duty of exercising the authority he possessed to prevent loss which could in the exercise of reasonable care and skill have been

¹⁸ *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 33 N. Y. St. Rep. 88, 25 Abb. N. C. 410, 25 N. E. 401, 8 Ry. & Corp. L. J. 484, 9 L. R. A. 527, 31 Am. & Eng. Corp. Cas. 313, reversing 5 N. Y. Supp. 124, 52 Hun, 166, 23 N. Y. St. Rep. 409, cited in *Mills v. United States Printing Co.*, 99 App. Div. 605, 617, 91 N. Y. Supp. 193, a case as to status of stockholder to attack an agreement with a trade union made by an executive committee of the corporation.

¹⁹ *Von Au v. Magenheimer*, 110 N. Y. Supp. 629, 126 App. Div. 257.

foreseen and guarded against. Nor are directors liable for mere errors of judgment where they act without corrupt intent and in good faith and are fairly competent to discharge the duties of the position, unless the acts be unlawful or *ultra vires*.²⁰

A person, however, who contracts as agent, without having in fact authority to do so, is personally responsible to those, who, in ignorance of his want of authority contract with him, though he acts in good faith, believing that he is invested with such authority. This liability is founded upon the implied promise of the person so contracting as agent, that he has authority to bind the principal; and the measure of damages is the loss sustained by the other contracting party by reason of his not having the valid contract which the agent assumed to make. So under an Ohio decision, the corporate powers, business and property, of corporations formed for profit, must be exercised, conducted and controlled by a board of directors, who cannot be chosen until ten per cent of the capital stock specified in the articles of incorporation has been subscribed. Persons contracting as directors, when less than that amount of stock has been subscribed, are without authority to create any corporate obligation, and become personally liable, though they believe in good faith that they are contracting in behalf of a legally constituted corporation, and that they have authority to bind it by the contract.²¹

Directors of a corporation, conducting its business and receiving moneys belonging to it after the expiration of the term for which it was incorporated, will be held to an account on the dissolution and the final liquidation of the affairs of the corporation in a court of equity.²² Where a corporation had certain theatrical leases, the right to a renewal belonged to the corporation, and an injury resulting from a wrongful failure

²⁰ *People v. Equitable Life Assurance Society*, 109 N. Y. Supp. 53, 124 App. Div. 714, rev'g 101 N. Y. Supp. 354, 51 Misc. 389.

²¹ *Trust Company v. Floyd*, 47 Ohio St. 525, 25 Ohio L. J. 35, 26 N. E. 110, 12 L. R. A. 346, 19 Wash. L. Rep. 514, 33 Am. & Eng. Corp. Cas. 218.

²² *Mason v. Pewabic*, 133 U. S. 50, 33 L. ed. 524, 10 Sup. Ct. 524.

to secure that right by the malfeasance of directors was an injury to the corporation for which it was entitled to sue.²³

The word "creditors" as used in the provision of a General Manufacturing Act,²⁴ making the stockholders of a corporation organized under it liable to the creditors of the company until the whole amount of the capital stock has been paid in and a certificate thereof filed, does not include directors of the corporation, and a director to whom the corporation has become indebted cannot enforce the liability so imposed. This rule applies to one named as a trustee in the certificate of incorporation of the company and who acts as such, although he owns none of its stock; he may legally act as trustee although not a stockholder.²⁵ In case of neglect or mismanagement of corporate affairs by officers or directors of a corporation whereby losses are sustained by it, the recovery is for the benefit of all creditors and stockholders regardless of the fact as to what party prosecutes such action, that is, whether it is the corporation or creditors or shareholders.²⁶

In an action against trustees for an accounting all are necessary parties if a right of contribution exists; not so, however, where the action is at law, for then there is no right to contribution. Moreover, even if such suits be in equity and some of the defendants be innocent of wrongdoing and yet liable to account with others guilty of wrongdoing there can be no contribution as between those who neither participated in the same acts nor served on the board of directors at the same time. Those sections of the New York Code of Civil Procedure²⁷ which allow an action to be brought by the attorney-general on behalf of the people, or in certain cases by a creditor, trustee, etc., against the directors of a corporation for misconduct, do not confer upon the parties enumerated in the

²³ Syllabus in *Singers-Bigger v. Young* (U. S. C. C. A.), 166 Fed. 82.

²⁴ Section 10, chap. 40, Laws 1848.

²⁵ *McDowall v. Sheehan*, 129 N. Y. 200, 41 N. Y. St. Rep. 415, 36 Am. & Eng. Corp. Cas. 137, 29 N. E. 299.

²⁶ *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 9 Ry. & Corp. L. J. 482, 13 Am. & Eng. Corp. Cas. 253, 4 Bkg. L. J. 249.

²⁷ Sections 1781, 1782.

latter section any new cause of action, except in respect to the removal or suspension of directors, but merely authorize the enforcement by the individuals named of causes of action which have accrued to the corporation and which might be enforced by it or its receivers, or by a stockholder in behalf of himself and all other stockholders in the right of the corporation. The action though brought in the name of the people is in the right of the corporation and for its benefit and to enforce causes of action which might have accrued to the corporation and might be enforced by it, or its receiver, or by a stockholder in behalf of himself and all other stockholders in the right of the corporation.²⁸

§ 262. Suit by Corporation Against Officers or Directors—Damages—Accounting.

No recovery can be had by a corporation for damages sustained by it by reason of a mere error of judgment of one of its officers in doing an act *ultra vires* but in a business carried on by the corporation itself.²⁹ But a corporation may sue one or more directors in equity for an accounting with respect to property of the corporation which has actually come into his or their hands, or for fraudulent breach of trust in the management of the corporation or its property and for the recovery of the value of property lost and incidental damages. So, too, it has an action at law against one or more directors for damages sustained by the corporation in consequence of his or their wrongful, negligent official acts of misfeasance or nonfeasance. But a suit in equity may not be joined with an action at law against the same directors.³⁰

²⁸ *People v. Equitable Life Assur. Soc.*, 109 N. Y. Supp. 53, 124 App. Div. 714, 729, reversing 101 N. Y. Supp. 354, 51 Misc. 389. In this case the action was by the attorney-general against former and present directors and the corporation was joined as defendant for an accounting for funds and for repayment.

²⁹ *Holmes v. Willard*, 125 N. Y. 75, 34 N. Y. St. Rep. 455, 25 N. E. 1089, 9 Ry. & Corp. L. J. 117, 33 Am. & Eng. Corp. Cas. 385.

³⁰ *People v. Equitable Life Assur. Soc.*, 109 N. Y. Supp. 53, 124 App. Div. 714, reversing 101 N. Y. Supp. 354, 51 Misc. 389.

§ 263. Suit by Stockholders Against Officers or Directors—Corporation as Party.

Stockholders may sue for an accounting against corporation officers with assets where the rights of parties would otherwise be lost, and the corporation in such case should be made a party defendant. Although ordinarily the corporation itself should bring suit for such accounting.³¹

An individual stockholder who has been induced to sell her stock to the managing officers of a corporation for an inadequate consideration by means of false representations as to the condition of the company and the amount of dividends it could pay, has an action on the case for damages, even though the fraud may have wronged the corporation and would support an action on its behalf by a stockholder. Where in such an action it appears that the defendant officers owning a large percentage of the stock, which had previously paid dividends from nine to fourteen per cent, declared only a three per cent dividend and represented to the plaintiff, a stockholder, that the company had suffered reverses, and at the same time increased their own salaries from two thousand five hundred dollars to seven thousand five hundred, but the day after purchasing plaintiff's stock, and less than a month from the time they declared said dividend, declared a special dividend of ten per cent and used the proceeds to meet the check given to the plaintiff in payment for her stock, and at the next regular meeting reduced the salaries of the officers to four thousand, a case of fraud and deceit is established.³² Where, however, the loss suffered by a stockholder, by reason of the wrongful and malicious acts of corporate officers done with specific intent to injure him, is not in addition to that which the corporation has sustained he cannot maintain any action therefor.³³ Individual stockholders cannot question in judicial proceedings, the corporate acts of directors, if such acts are within the power and in furtherance of the purposes of the

³¹ *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894.

³² *Von Au v. Magenheimer*, 110 N. Y. Supp. 629, 126 App. Div. 257.

³³ *Wells v. Dane*, 101 Me. 67, 63 Atl. 324.

corporation, are done in good faith, in the exercise of an honest judgment, and are not unlawful or contrary to good morals. Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, or of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors if their powers are without limitation and free from restraint.³⁴ An action at law cannot be maintained by a single stockholder against the corporation directors for mismanagement of its affairs or for defrauding it, since such directors stand in the relation of agents to the company and are liable only to it as their principal for their acts.³⁵ Although, by reason of the payment of excessive dividends a deficit exists recovery cannot be had by a shareholder in a suit against the directors.³⁶ The fact that an offer to purchase the corporate property has not been communicated to the stockholders by the directors does not render them liable to the stockholders for effecting in pursuance of a vote of the stockholders a lease of the corporate property, it not appearing that the stockholders would have acted differently had they had knowledge of such offer or that there was a responsible offer.³⁷ The corporation is a necessary party defendant in an action by one or more stockholders, brought for the benefit of all, against the corporate directors for misappropriating funds, and even in an equitable action the failure to do so is not excused by averments of inability to make service upon such corporation in the State where the action is brought, that it was organized under the law of another State, and that it refuses to appear; nor is such failure excused by a prayer to appoint a trustee to hold such moneys as may be found due.³⁸

³⁴ *Ellerman v. Chicago Junction Rys. & Union Stock Yards Co.*, 49 N. J. Eq. 217, 23 Atl. 287, 11 Ry. & Corp. L. J. 97, 35 Am. & Eng. Corp. Cas. 388.

³⁵ *Allen v. Curtis*, 26 Conn. 456.

³⁶ *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 9 Ry. & Corp. L. J. 482, 13 Am. & Eng. Corp. Cas. 253, 4 Bkg. L. J. 249.

³⁷ *Strunk v. Owen*, 199 Pa. St. 73, 48 Atl. 888.

³⁸ *Deming v. Beatty Oil Co.*, 72 Kan. 614, 84 Pac. 385.

§ 264. Suit by Stockholders Against Directors—Negligence — Maladministration — Averments Necessary — What Must Be Shown.

In an action against directors of a corporation for negligently wasting the property of the corporation brought under the New York Code of Civil Procedure,³⁹ the plaintiff must allege the facts constituting negligence or misconduct, misfeasance or malfeasance the same as if the action had been brought by the corporation itself. It was not the intention of the legislature in enacting the New York Code of Civil Procedure⁴⁰ to require directors of a corporation to account as in cases of trustees of express trusts and more must be alleged than the mere fact that the defendant was a director. Thus, where a defendant is sued solely for acts of omission as a director and it is not alleged that he received any property of the corporation for which he failed to account, or voted in favor of any unlawful disposition of corporate property or fraudulently connived thereat, or was guilty of any breach of trust, and he is not charged with having profited directly or indirectly by any of the acts of other defendants vested with executive functions, and it is not charged that he was guilty of negligence in failing to insist upon the adoption of appropriate by-laws to safeguard the corporation, or in voting for officers or approving the appointment of employes or in voting for or refraining from voting against any specific action of the directors, or that he had any knowledge or reason to suspect misconduct of members of executive committees or other officers or employes of the corporation, or that he has failed to take part in the proceedings at any meetings of the directors at which he should have attended, or has been guilty of anything more than an honest error of judgment, the complaint fails to state a cause of action against him.⁴¹ In a case in the United States Supreme Court which has very often been cited

³⁹ Section 1781.

⁴⁰ Sections 1781, 1782.

⁴¹ *People v. Equitable Life Assur. Soc.*, 109 N. Y. Supp. 53, 124 App. Div. 714, reversing 101 N. Y. Supp. 354, 51 Misc. 389.

and quoted from, a shareholder in a waterworks company brought his bill in equity against a city, the company and its directors, alleging that the company was furnishing the city with water, free of charge beyond what the law required it to do, and that the directors, contrary to his request, continued to do so to the great injury of himself, the other shareholders and the company. It was held that in such case there must be shown: (1) Some action or threatened action of the directors or trustees which is beyond the authority conferred by the charter, or the law under which the company was organized; or (2) such a fraudulent transaction, completed or threatened, by them, either among themselves or with some other party, or with shareholders, as will result in serious injury to the company or the other shareholders; (3) that the directors, or a majority of them, are acting for their own interests, in a manner destructive of the company, or of the rights of the other shareholders; or (4) that the majority of the shareholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other shareholders, which can only be restrained by a court of equity; and (5) it must also be made to appear that the complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, and that the ownership of the stock was vested in him at the time of the transactions of which he complains, or was thereafter transferred to him by operation of law.⁴²

§ 265. Individual Liability of Officers and Trustees to Creditors Where Capital Stock Not Subscribed—Suit in Equity by Creditors Against Directors.

Officers and trustees of corporations are not individually liable to the corporation creditors because the capital stock of the corporation was not subscribed where the statute does not impose individual liability in express terms and where subscription to the capital stock is not essential to the legal existence of a corporation; unless liability is fixed by the mere

⁴² *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827.

act of transacting business before the whole capital stock was subscribed.⁴³ Equity will permit defrauded creditors to sue directors of a dissolved corporation to recover assets or money which the directors have wrongfully converted.⁴⁴

§ 266. Suits by and Rights of Minority Stockholders—When Corporation Should Be Made Party.

Where the action resulting from the votes of the shareholders owning a majority of the stock of a corporation is so detrimental to the corporation itself as to lead to the necessary

⁴³ *American Radiator Co. v. Kinnear* (Wash., 1909), 105 Pac. 630, a case of action by the plaintiff corporation against certain parties as officers and trustees of a manufacturing company. The court, per Rudkin, C. J., said: "Cases may be found where officers of corporations have been held individually liable to the corporation creditors because the capital stock of the corporation was not subscribed, but these cases rest upon an express statute imposing individual liability in such cases, or upon the ground that there is no corporation until the capital stock is subscribed. In *First National Bank of Salem v. Almy*, 117 Mass. 476, and *Cummings v. Winn*, 89 Mo. 51, 14 S. W. 512, cited by the appellant, the liability was based upon an express statute, and similar statutes exist in many of the States. In *Walton v. Oliver*, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355, and *Wechselberg v. Flour City Bank*, 64 Fed. 90, 12 C. C. A. 56, 26 L. R. A. 470, the individual liability was upheld on the ground that there was no corporation to be bound. These decisions are not controlling here, for our statute does not impose individual liability in express terms, and subscription to the capital stock is not essential to the legal existence of a corporation. *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141. For the like reason, *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846, and other like cases, basing liability on excess of authority of corporate agents, are inapplicable, for if the corporation is bound there is no excess of authority. The very fact that the appellant recovered judgment against the corporation affords conclusive evidence that the trustees in contracting the debt did not exceed their authority. For these reasons there is no liability on the part of the respondents in the present case, unless their liability is fixed by the mere act of transacting business before the whole capital stock was subscribed. While there is some conflict of authority on this question, the weight of authority denies individual liability in such cases, holding that the State alone can complain of the violation of its laws." The court then considers and quotes from *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050, and quotes at length from *Snider Sons' Co. v. Troy*, 91 Ala. 224, 8 So. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, and also relies upon Title 23, chap. 1, 1 Ballinger's Ann. Codes & St., §§ 4250, 4265, 4266 (Pierce's Code, §§ 7063, 7067, 7068).

⁴⁴ *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621.

inference that the interests of the majority lie wholly outside of and in opposition to the interests of the corporation and of a minority of the stockholders and that such action is a wanton or fraudulent destruction of the rights of the minority, it may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders, and where, in such case, the directors or trustees have acted with and formed part of the majority, an action may be sustained by one of the minority shareholders, suing in his own behalf and in that of all others coming in, to enjoin the action contemplated; in such suit the corporation should be made a party defendant.⁴⁵ In order, however, to give a standing in a court of equity to a small minority of stockholders contesting an *ultra vires* act of the directors, against which a large majority makes no objection, it must appear that they have exhausted all the means within their reach to obtain redress of their grievances within the corporation itself, and that they were stockholders at the time of the transactions complained of, or that the shares have devolved upon them since by operation of law.⁴⁶ Where the statute requires that the question of a lease be submitted to a vote of the stockholders and the lease is made without compliance with such requirement a bill to set aside the lease may be maintained by minority stockholders.⁴⁷ A court of equity

⁴⁵ *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 33 N. Y. St. Rep. 88, 25 Abb. N. C. 410, 25 N. E. 401, 8 Ry. & Corp. L. J. 484, 9 L. R. A. 527, 31 Am. & Eng. Corp. Cas. 313, reversing 5 N. Y. Supp. 124, 52 Hun, 166, 23 N. Y. St. Rep. 409, cited in *Farmers' Loan & Trust Co. v. New York & Northern Ry. Co.*, 150 N. Y. 410, 426 (as to right of minority stockholders to come into equity for relief where act of majority is fraudulent, etc.); *Rathbone v. Ayer*, 121 App. Div. 355, 360, 105 N. Y. Supp. 1044 (a case of sale by directors to corporation; fair price of property; good faith, etc.), cited and quoted from in *Continental Ins. Co. v. New York & Harlem Rd. Co.*, 103 App. Div. 282, 297, 93 N. Y. Supp. 39 (as to circumstances under which minority stockholders can maintain an action in equity to rescind act of majority).

⁴⁶ *Dimpfell v. Ohio & Mississippi Ry. Co.*, 110 U. S. 209, 3 Sup. Ct. 357, 28 L. ed. 121.

Right of minority stockholder to sue in equity; laches. See *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337.

⁴⁷ *Rogers v. Nashville, C. & St. L. R. Co.* (U. S. C. C. A.), 91 Fed. 294,

has power at the suit of a minority of the stockholders to order a dividend of the corporation's assets where the safety of the interests of the minority requires it. In determining whether to exercise such powers in a particular case, the object of the corporation and the situation of its affairs must be taken into consideration. So where a majority of the stockholders have combined to so manage the corporate business as to divert all the profits of the enterprise from their legitimate channel and destination, and to appropriate them to their own use, and have in part executed their plan, and the circumstances are such as to render any change in the personnel of the management impracticable, a proper case exists for the intervention of the court to make division of the assets.⁴⁸

Equity will also grant relief to a minority stockholder in a corporation by the appointment of a receiver where there was collusion between the officers to unfairly deal with the plaintiff by dismissing him from office and absorbing the profits of the business in large increased salaries to themselves.⁴⁹ A recovery cannot, however, be had from a board of directors because of a loss sustained by minority stockholders consequent upon the winding up and liquidation of the corporate affairs by reason of the acts of the majority of the stockholders.⁵⁰ A bill will also be dismissed for want of equity when brought by a minority stockholder of a trading corporation when, although it complains of the management of the majority still it does not sufficiently and specifically allege any *ultra vires* or *prima facie* fraudulent act, but deals only in general suggestions and allegations of fraud and conspiracy, and all the allegations of fact relate only to the ordinary business and management of the corporation, while the real gravamen of the bill appears to be that a near relative is not permitted to be an active official, president, director or clerk in

33 C. C. A. 517, 62 U. S. App. 49, 697, 10 Am. & Eng. Corp. Cas. (N. S.) 82.

⁴⁸ *Fongerey v. Cord*, 50-N. J. Eq. 185, 24 Atl. 499, 12 Ry. & Corp. L. J. 89.

⁴⁹ *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.

⁵⁰ *Trisconi v. Winship*, 43 La. Ann. 45, 9 So. 29, 9 Ry. & Corp. L. J. 469, 33 Am. & Eng. Corp. Cas. 271.

the corporation and in such capacity to represent plaintiff's interest as he formerly did. Such averments do not warrant an injunction restraining the dissipation of assets or the retention of the bill for the purpose of ascertaining the value of complainant's stock with a view to compel the corporation or the majority stockholders to buy or pay for the same, especially when to carry out such a purpose would be either to force a liquidation of the corporation not insolvent, or the majority stockholders to buy or sell to protect their interests.⁵¹ That a corporation may be involved in litigation by the acts of a majority of the stockholders does not constitute a sufficient ground for equity to interfere at the suit of the minority stockholders.⁵²

§ 267. Suits by and Rights of Minority Stockholders—Creating New Corporation—Consolidation Agreement.

In a late case in the Court of Appeals of New York a proposed plan, by which a majority of the stockholders of a corporation authorized, empowered and directed its directors to create a new corporation in which the old corporation should be the only stockholder with only the capital of the old corporation, was examined and held to be an evasion of the law, which does not permit one corporation to create another, endow it with capital from its own assets and take all its shares of stock in exchange and hold them for sale. Therefore, a minority stockholder who opposed the scheme was held entitled to an injunction, even without alleging injury or the certainty thereof in the future; and in such case the fact that the agreement to sell was claimed to have been ratified by two-thirds of the stockholders does not validate the method of selling as to any stockholder who objected, since ratification may confirm a voidable act but not one utterly void.⁵³

⁵¹ *Thomas & Barton Co. v. Thomas* (U. S. C. C. A.), 165 Fed. 29.

⁵² *Converse v. Hood*, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521.

⁵³ *Schwab v. Potter Co.*, 194 N. Y. 409, 87 N. E. 670, affirming 113 N. Y. Supp. 439, 129 App. Div. 36. (1) The decision in this case in the court below was as follows: The complaint of a minority stockholder which in

A consolidation agreement entered into by the directors of two corporations is neither void nor voidable at the election of a minority stockholder, merely on the ground that the directors making the agreement were the common directors of both corporations, or on the ground that the consolidation may be practically a sale to one of the corporations which is a majority stockholder of the other corporation. And one purchasing stock in a corporation, organized for a specified period, cannot object to its subsequent exercise, in a legal manner, of the power to consolidate with another corporation, where the power existed at the time of the purchase, but was conferred subsequent to its organization, but the right to object to the consolidation belongs only to the persons who were shareholders before the power to consolidate was given. Again, in this connection it may be stated that individual stockholders are not trustees for each other, but each may, as a member of the general corporate body, exercise his individual right and vote equally with other stockholders on the ratification of a contract in which he is interested, subject to the qualification that the majority stockholders cannot

substance alleges that at a meeting the majority stockholders directed the organization of another corporation at the expense of their own corporation and that real estate owned by their corporation should be transferred to the new corporation at an inadequate price in exchange for all its capital stock which the directors were empowered to offer for sale to stockholders on certain terms, and praying that the proposed transaction be enjoined, states a cause of action. (2) This, because while an act within the powers of directors and majority stockholders will not be interfered with by the courts in the absence of fraud, the scheme aforesaid is a mere device to increase the capital stock of the corporation without complying with the statute governing such proceeding, and hence the proposed action is *ultra vires*. (3) A minority stockholder who does not desire to pay what is in effect a forced assessment by subscribing for the stock of the new corporation in order to preserve his proportionate interest in his corporation, is a party aggrieved and entitled to sue for an injunction. (4) It is no answer to said complaint to allege that it was necessary to sell the property at a certain sum, or even less, to conserve the interests of the stockholders, that being a mere conclusion. (5) Nor is it a defense to allege that an agreement to sell the property pursuant to said resolution was ratified and confirmed by the majority stockholders, for they could not ratify an act which was unlawful.

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so deal with the assets of the corporation as to divide them between themselves to the exclusion of the minority.⁵⁴

§ 268. When Stockholder May and May Not Sue in Equity.

A stockholder may sue for an injunction to prevent *ultra vires* acts of the corporation.⁵⁵ A demurrer to a stockholder's bill will not be sustained on the ground that the corporation itself must sue for the relief prayed for, where the bill, which asks for an accounting and the appointment of a receiver, shows the passage of a resolution several years prior thereto by the stockholders of a bank, of which the defendants were directors, whereby the corporate affairs were to be wound up and the stock with the profits thereon were to be returned to the stockholders by the bank's officers; but that notwithstanding such resolution only a part of said stock had been returned and the business was still carried on at a great loss of assets consequent upon the business inability of said officers and that the complainant had been unable to obtain a distribution of her stock or any information concerning the bank's affairs.⁵⁶ Stockholders, although controlled by action of the directors, cannot fraudulently repurchase stock and sell it back to the corporation at an advance on the market price, where the original purpose for which such stock was given them was to sell the same and pay certain corporate debts out of the proceeds, but they converted such proceeds for repurchasing; and stockholders who do not consent thereto are not bound by a ratification of the fraudulent sale made by a majority of the stockholders.⁵⁷ A single stockholder cannot sustain a suit to set aside a sale at public auction, after due notice and advertising, of a part of the property of a corporation, made for the purpose of paying debts incurred by trustees

⁵⁴ *Wheeler v. United States Leather Co.*, 73 N. J. Eq. 72, 72 Atl. 126.

⁵⁵ *Booth v. The Monroe Broad Gauge Street Rd. Co.*, 75 Iowa, 722, 25 N. W. 143.

⁵⁶ *Marshall v. Bank of Albemarle*, 60 S. C. 183, 38 S. E. 437.

⁵⁷ *Wheeler v. Howe*, 88 Cal. 184, 26 Pac. 111, 9 Ry. & Corp. L. J. 341, a suit brought by three stockholders against a corporation.

and in furtherance of an authority conferred at a stockholder's meeting where the full worth of the property was obtained and was approved by the stockholders who had combined to protect the property from being sold at a sacrifice, and in whose interest one of the trustees who was the secretary had purchased the property.⁵⁸ And where one corporation attempts to infringe a trade-mark of another corporation and to interfere with its business a suit cannot be brought by a stockholder of the latter corporation to restrain such acts.⁵⁹

Although there was an agreement between the original stockholders of a corporation providing that if unissued stock were offered for purchase all parties should have a right to purchase an equal amount thereof, a stockholder deriving her title under a will of one of the parties to the agreement, which will provided that the conditions of the agreement should be binding upon his representatives and legatees, is not entitled to maintain a suit as a stockholder representing the corporation to have a sale of stock to an employé of the company canceled upon the ground that she was not offered an opportunity to subscribe for a proportionate part of the shares sold. This, because the corporation itself not being a party to the agreement could not bring such action, and whatever rights the plaintiff had under the will were personal to her and to be asserted against the parties to the agreement. Such action cannot be based upon fraud perpetrated upon the corporation where it appears that all stockholders with the exception of the plaintiff acquiesced in the sale and that the directors subsequently ratified the same by resolution.⁶⁰

§ 269. Right of Stockholders to Sue in Equity in a Federal Court for Surplus Assets After Decree of Forfeiture of Franchises.

In a case decided in 1855 in the Supreme Court of the United States it appeared that in the State of Mississippi a judgment

⁵⁸ *Hayden v. Official Hotel Red-Book & D. Co.* (U. S. C. C.), 42 Fed. 875.

⁵⁹ *Converse v. Hood*, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521.

⁶⁰ *Waters v. Waters & Co.*, 115 N. Y. Supp. 432, 130 App. Div. 678.

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of forfeiture was rendered against the Commercial Bank of Natchez, and a trustee was appointed to take charge of the books and assets of the bank. Under the laws of that State and the general principles of equity jurisprudence, the surplus of the assets which might remain after the payment of debts and expenses, was held to belong to the stockholders of the bank. The court examined the English cases as to what becomes of the property of a corporation whose charter had been forfeited by a judicial sentence and determined that the rules of the English courts had been adopted in the United States, extending the protection of chancery over the civil rights of members of moneyed corporations, and recognizing the existence of distinct and individual rights in their capital and business; that the trustee was estopped from denying the title of the stockholders to a distribution; that the courts of the United States had jurisdiction over such a case; and that a bill could be maintained, filed by a number of stockholders owning one-fifth part of the capital stock, suing for themselves and such of the stockholders as were not citizens of Mississippi nor defendants in the bill.⁶¹

§ 270. Suit by Stockholder Against Trustee of Funds for Dividends—Defense—Counterclaim.

Where trustees acting under an agreement for the voluntary dissolution of a corporation taken pursuant to the Stock Corporation Law of New York,⁶² or at least taken along lines quite similar to those prescribed by such statute, declare a dividend upon the stock of the corporation, deposit the funds applicable to the payment of the dividend with a trust company, acting as their agent in the matter, and notify the stockholders that the dividend will be paid by the trust company on demand, the stockholders may, in the event of the refusal of the trust company to pay the dividends on demand, maintain an action against the trustees to recover the amount of

⁶¹ *Bacon v. Robertson*, 18 How. (59 U. S.) 480, 15 L. ed. 499. See *Mason v. Penabie Min. Co.*, 66 Fed. 396. See also § 238, herein.

⁶² Section 57.

the dividend as for money had and received, although such money is still in the hands of the trust company. The action not being brought to recover the specific amount of money appropriated for dividends, but rather on the theory that the trustees have had and received for the use and benefit of the stockholders the amount of the dividends to which they, the latter, were entitled, it is no defense to the trustees that after having received the moneys they wrongfully parted with the possession thereof. Where, in such an action, the trustees interposed a counterclaim alleging that they appropriated the money delivered to the trust company for the payment of the dividends to the satisfaction of an alleged indebtedness of the plaintiff's assignors to the corporation, the interposition of such counterclaim is evidence that the trustees controlled the action of the trust company.⁶³

§ 271. Suit by Stockholder to Compel Successor in Interest of Lessee to Pay Rent Reserved.

Where the possession of property has been transferred under a contract legal in itself, but induced by fraud, while the fraud

⁶³ *Janeway v. Burn*, 86 N. Y. Supp. 628, 91 App. Div. 165, affirmed (mem.) 180 N. Y. 560, 73 N. E. 1125. It appeared that certain of the stockholders claiming the dividend had contracted with the trustees for the purchase of certain real and personal property owned by the corporation. Possession thereof was to be given to the purchasers on or before August 31, 1900. The contract provided that "the company and trustees shall, whenever thereunto advised by their counsel, execute and deliver to the purchaser" a deed of the premises containing covenants against the grantor's acts and execute and deliver a bill of sale of the personal property. The bill of sale was executed March 15, 1901, and the deed on April 4, 1901. Prior to the delivery of possession or of the bill of sale of the personal property to the purchasers, the trustees paid taxes which were assessed against the personal property April 15, 1900. After delivery of possession of the realty to the purchasers and prior to the execution and delivery of the deed, taxes which had become a lien on the realty September 1, 1900, were paid by the trustees. It was not pretended that the taxes were paid at the request or by the direction of the purchasers, nor did it appear that the corporation was personally liable for such taxes. It was held, that the trustees could not counterclaim against the dividend the amounts paid for taxes on the real or personal property; and that the payments made for taxes were mere voluntary payments imposing no liability on the purchasers as for money had and received.

furnishes ground for rescinding the contract and avoiding the obligations imposed thereby, it may not be availed of as a means of continuing possession of the property without meeting those obligations. Express ratification need not be shown, but where the party, after knowledge of the fraud and an opportunity to rescind, still retains the possession and use of the property, without any offer to return the same, the fraud is waived and the contract becomes valid by acquiescence. While the rule which forbids persons who fill fiduciary positions from using them for their own benefit, is strict in its requirements and extends to all transactions where the individuals' personal interest may be brought into conflict with his acts in a fiduciary capacity, and works independently of the question whether there was fraud or good intention, it does not operate to avoid *ab initio* all transactions of a trustee where he is interested, but it is generally limited in its operation to rendering them voidable at the election of the party whose interests are concerned; and so, if nothing is done in avoidance the transaction remains undisturbed.⁶⁴ In this case the S. B. & E. J. R. R. Co., defendant, was incorporated to construct a railroad to connect the road of the E. R. Co. with other railroads; some of the incorporators were directors of the latter company. In June, 1870, a contract was made by the new company ostensibly with one S., who agreed to construct the road, the company to issue in payment therefor one million dollars of its bonds and five hundred thousand dollars of its capital, which was to constitute all of its stock and bond debt. S. in reality acted for a syndicate composed wholly of members of the board of directors of said company, part of whom were also directors of the E. R. Co.; S., a few days thereafter, assigned the contract to the syndicate. In July, 1870, the new company leased all of its property and franchises to the E. R. Co., the lessee agreeing to pay as rent a certain proportion of the gross earnings, guaranteeing that this should never be

⁶⁴ *Barr v. New York, Lake Erie & Western R. R. Co.*, 125 N. Y. 263, 31 N. Y. St. Rep. 743, 43 Abb. L. J. 151, 26 N. E. 145, 9 Ry. & Corp. L. J. 174, reversing 5 N. Y. Supp. 623, 52 Hun, 555, 24 N. Y. St. Rep. 188.

less than one hundred and five thousand dollars. The executive committee of the E. R. Co. passed a resolution, which, after reciting the lease and the guaranty of a rental equal to seven per cent interest on the bonds, and seven per cent dividends on the stock of the lessor, authorized the execution of a guaranty of the payment of semiannual dividends of three and one-half per cent on the stock. The stock and bonds were issued to members of the syndicate; they expended about eight hundred and fifty thousand dollars in the construction of the road. In December, 1870, the road, being about completed, was taken possession of by the lessee. In February, 1871, the directors of the lessor formally ratified the lease. In 1875, the lessee became insolvent; a receiver was appointed who, by authority of the court, continued to operate the leased road. The lessee and its receiver bought in all of the stock of the lessor, except certain shares owned by plaintiffs, and thereby obtained complete control, and thereafter elected directors in the interest of the lessee. The property and assets of the lessee, including the lease, were sold under a mortgage foreclosure judgment. In 1878, the New York, Lake Erie & Western Railroad Company became the owner, it covenanting to pay all of the receiver's liabilities, and it had still continued to operate the leased road, which was of great value to it as connecting its own and other roads, but it had paid nothing except interest on the bonds, refusing to pay that portion of the rental represented by the guaranty of dividends on the stock. In an action to compel the N. Y., L. E. & W. R. R. Co., as successor in interest of the lessee, to pay the balance of the rent reserved, the trial court found that the syndicate, fraudulently and for their own benefit and gain, caused the building contract, the lease and the guaranties to be made, and directed a dismissal of the complaint. It was held an error; that the fraudulent nature of the transaction did not render the lease absolutely void, but simply voidable; and that the lessee and its successor in interest could not retain the possession and enjoy the use of the leased property, after knowledge of the fraud and with opportunity to act in repudiation, without becoming liable to

pay the rent reserved; that the vice in the original transaction did not necessarily so affect the lease as to prevent ratification, or its survival after acts on the part of the lessee and its successors in interest, with knowledge of the fraud, amounting in effect to acquiescence and waiver. It was also held, that plaintiffs, as stockholders, could maintain the action, as their corporation was wholly under the control of its lessee. Again it was held, that defendant, the N. Y., L. E. & W. R. R. Co., was not in a position to question the legality or validity of the issue of the shares of stock held by plaintiffs, as the members of the syndicate that built the road of the S. B. & E. J. R. R. Co. were practically the company, they holding all of its stock, and so, the manner in which they chose to build the road and to divide up their interests, concerned only themselves, and however illegal the transaction, no one, so far as appeared, could complain. It seems that no principle of law forbade the said company from agreeing to pay for the construction of its road in the way or in the amount it did.⁶⁵

§ 272. Right of Subsequent Stockholders to Sue.

The weight of authority seems to be that a person who was not a stockholder at the time of the transactions complained of cannot complain or bring a suit to have them declared illegal.⁶⁶ A distinction exists between the right of a stockholder to complain of an *ultra vires* act committed before he acquires the shares, and which the prior owner neither participated in nor assented to, and the attitude of one who acquires shares with knowledge that the prior owner had voted them in favor of the act subsequently sought to be annulled by the subsequent holder. In the first case the present holder is not debarred or estopped from maintaining suit, unless prevented by some statute or rule of court. In the latter case, however, it would seem that the assignee of shares stands in the former owner's place, in so far that he cannot object to the act ap-

⁶⁵ *Id.*; *Munson v. S. G. & C. R. R. Co.*, 103 N. Y. 58; *Wardell v. R. R. Co.*, 103 U. S. 651, 26 L. ed. 509, distinguished.

⁶⁶ *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337, 8 S. E. 630.

proved of by such prior owner, and this applies to enable a *bona fide* purchaser to obtain an injunction against the ratification of an illegal transfer of corporate property, which was made prior to the purchase of the stock, was *ultra vires*, and was never acquiesced in by such prior owner.⁶⁷ Subsequent stockholders, therefore, have no standing as a general rule to attack prior mismanagement of the corporation. Such a stockholder ought not to be allowed to sue unless the mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner.⁶⁸ So stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoers and through prior mismanagement, have no standing to complain thereof.⁶⁹ Nor have stockholders any remedy in a suit for alleged frauds occurring prior to becoming stockholders by purchase, as where illegal salaries are paid directors prior to acquiring such stock, but otherwise where the grievance complained of thereafter occurred without his knowledge.⁷⁰

§ 273. When Corporation and Not Stockholders Should Sue Under Sherman Anti-Trust Act.

In a case in the Federal Circuit Court, decided in 1909, the declaration was framed in reliance upon the Sherman Anti-Trust Act⁷¹ and claimed threefold damages under said act. It was averred in substance that the plaintiff was a stockholder in a named company, organized to operate an independent telephone system throughout the United States and that the defendant secured control thereof by the purchase of shares of its stock for the purpose of preventing the free operation of competition in the interstate telephone traffic and commerce

⁶⁷ *Forrester v. Boston & Montana Consol. Copper & S. Min. Co.*, 21 Mont. 565, 55 Pac. 353.

⁶⁸ *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 108 Am. St. Rep. 716, considering fully many authorities pro and con.

⁶⁹ *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 108 Am. St. Rep. 716, 93 N. W. 1024, 60 L. R. A. 927.

⁷⁰ *Rankin v. Brewery & Ice Co.*, 12 N. Mex. 54, 73 Pac. 614.

⁷¹ Act July 2, 1890, chap. 647, § 1, 26 Stat. 209, U. S. Comp. Stat. 1901, p. 3200.

which it had planned to carry on, and in the attempt to monopolize such commerce; that said controlled corporation had since been managed by the defendant, not for the purpose of developing its business, but for the purpose of preventing it from doing business and to suppress and smother competition, causing the said controlled company to be placed in a receiver's hands; and that by the exercise of said control the defendant had since monopolized such interstate telephone commerce, and that plaintiff's shares of stock in his company were being rendered worthless. Upon demurrer the question was whether the declaration set forth any injury whereby the plaintiff had sustained any special damage peculiar to himself and distinguishable in kind from that common to the other shareholders as the result of an injury to the corporation in its business or property under § 7 of the Sherman Act. It was held, however, that the injury set forth was to the corporation, and that it alone could maintain an action at law under the enactment. The court said in this connection that: "The Sherman Act does not by its terms affect the question whether an injury is in legal contemplation an injury to the corporation or an injury to the stockholder. This question must be determined upon ordinary principles of law. There can be little doubt that the ordinary principle of representation of the stockholders by the corporation is as applicable to a violation of the Sherman Act as to any other violation of law. There is no indication of an intention of Congress to subject a defendant to independent suits by a multitude of stockholders for an act for which the statute affords redress to the corporation itself."⁷² It was further held that the possibility that at the trial, proof might be introduced of an injury other than that averred in the declaration, was not a good reason for overruling the demurrer and could not be considered upon demurrer; that under the general averment that "the plaintiff has been greatly injured in his business and property" a special injury constituting a different cause of action could not be shown. As the plaintiff's company, however, was in a receiver's hands

⁷² Per Brown, Dist. J.

the court declared that "there should be little practical difficulty in working out the stockholder's right through directions to the receiver as to suits upon causes of action belonging to the corporation." ⁷³

§ 274. When Corporation Should Sue or Be Made Party to Suit by Stockholder.

The general rule is that when directors or officers of a corporation are charged with the mismanagement of the corporate property, the action to redress should be instituted by the corporation.⁷⁴ And although a stockholder may bring a suit when the corporation refuses, yet, as in such a case the suit can be maintained only on the ground that the rights of the corporation are involved, the corporation should be made a party to the suit.⁷⁵ Again, even though the corporation itself should sue for damages in a case where the minority stockholder's interest has been injured by the wrongful foreclosure of a mortgage, yet if said corporation refuses to bring an action it is a necessary party to a suit for relief brought by a stockholder in behalf of all others injured in like manner; but a minority stockholder cannot sue where the injury is common to all the stockholders.⁷⁶

§ 275. When Stockholder May Be Made Party Defendant by Court—Refusal to Permit Stockholders to Defend.

Stockholders of a corporation who have been allowed to put in answers in the name of a corporation, cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant, for the purpose of protecting, from unfounded and illegal claims against the company, his own

⁷³ *Ames v. American Telephone & Teleg. Co.* (U. S. C. C.), 166 Fed. 820.

⁷⁴ *Sigwald v. City Bank*, 82 S. C. 382, 385, 64 S. E. 398.

⁷⁵ *Davenport v. Dows*, 18 Wall. (85 U. S.) 626, 21 L. ed. 938.

⁷⁶ *Niles v. New York Central & H. R. Rd. Co.*, 71 N. Y. Supp. 271, 35 Misc. 69.

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interest and the interest of such other stockholders as choose to join him in the defense.⁷⁷

When stockholders intervene in a suit filed against the corporation and allege that through fraud and collusive conduct the officers and directors refuse to defend such suit, it is not error to refuse to permit such stockholders to appear and defend in the name of the corporation, when they decline to proceed in their own names as stockholders, in behalf of themselves and other stockholders who may see proper to join with them in defense of such suit.⁷⁸

§ 276. Stockholders as Necessary Parties in Suit by Policy Holder Against Insurance Company for Accounting and Receivership—Equity Jurisdiction.

In a late case in the Supreme Court of the United States the following points were decided: (1) The wrongdoing of former officers of an insurance company, and their continuance in power, in the absence of any trust relation, gives no jurisdiction for an accounting in equity in a suit in which the company is the only defendant as between a simple debtor and creditor. (2) The Equitable Life Assurance Society is not a trustee of its policy holders under its charter and policies as the same have been construed by the highest courts of the State of New York. (3) As the charter and contract have been construed by the highest court of New York, a policy holder in the Equitable Life Assurance Society can only participate in the surplus of the society according to the terms of the policy; and a discretion rests with the officers of the society as to what amount of surplus shall be retained and distributed, and when the distribution shall be made. (4) While wrongdoing, waste and misapplication of funds reducing the surplus of an insurance company before distribution, might give ground of action to a policy holder,

⁷⁷ *Bronson v. La Crosse & M. Rd. Co.*, 2 Wall. (69 U. S.) 283, 17 L. ed. 725.

When person should not be admitted to defend although claimed by plaintiff to be a stockholder but he does not admit that he is one. See *Meyer v. Bristol Hotel Co.*, 163 Mo. 59, 63 S. W. 96.

⁷⁸ *Cornell v. Sims*, 111 Ga. 828, 36 S. E. 627.

it would not necessarily, where there is no allegation of insolvency, give ground for equitable action. (5) Where the bill avers solvency of defendant at present, a prediction of insolvency in the future on account of inability to meet claims of policy holders by reason of mismanagement is a mere conclusion of law and not a fact which is admitted by demurrer or on which a court can grant equitable relief. (6) Where a suit for accounting by a policy holder against an insurance company as sole defendant avers that the stockholders claim to own the surplus, no decree can be made as to such ownership without the presence of the stockholders as parties. (7) Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law, and where, so far as necessary, discovery may be obtained as well as in equity.⁷⁹ (8) A complainant who can obtain all the relief to which he is entitled in a single suit cannot invoke the interference of a court of equity on the ground that defendant may be saved a multiplicity of suits against it by others situated similarly to himself.⁸⁰

§ 277. Transfers of Stock—Pledge for Collateral Security—Liability of Pledgee as Stockholder—National Banks—Bailment.

One to whom corporate stock has been transferred as collateral security, but who appears upon the books of the corporation as the general owner thereof, is liable as a stockholder for the debts of the corporation. Where, however, shares of stock are transferred to a party as collateral security, and they are so registered in the stock record of the corporation, whereby his true relation to the stock appears, he is not liable as a stockholder for the debts of the corporation.⁸¹ So a party who, by way of pledge or collateral security for a loan of

⁷⁹ See Rev. Stat., § 724; *United States v. Bitter Root Co.*, 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. 318.

⁸⁰ *Equitable Life Assurance Soc. v. Brown*, 213 U. S. 25, 53 L. ed. —, 29 Sup. Ct. —, reversing 151 Fed. 1.

⁸¹ *Marshall, Field & Co. v. Evans, Johnson, Sloane & Co.*, 106 Minn. 85, 118 N. W. 55.

money, accepts stock of a national bank which he causes to be transferred to himself on its books, incurs immediate liability as a stockholder, and he cannot relieve himself therefrom by making a colorable transfer of the stock, with the understanding that at his request it shall be transferred. A national bank which had so accepted, and caused to be transferred to it, shares of stock of another national bank, was, on the latter becoming insolvent, sued as a stockholder. It was held, that a loan of money by a national bank on such security is not prohibited by law; and if it were, the defendant could not set up its own illegal act to escape the responsibility resulting therefrom. The order of the Comptroller of the Currency prescribing to what extent the individual liability of the stockholders of an insolvent national bank shall be enforced, is conclusive.⁸² A creditor who receives from his debtor a transfer of shares in a national bank as security for his debt, and who surrenders the certificates to the bank and takes out new ones in his own name in which he is described as pledgee, and holds them afterward in good faith as such pledgee, and as collateral security for the payment of his debt, is not a shareholder subject to the personal liability imposed upon shareholders by act of Congress. The previous cases relating to the liability of such shareholders were examined by the court in this case and were held to establish that the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of said enactment.⁸³ It was also held (1) That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of the Revised Statutes of the United States,⁸⁴ and there-

⁸² *National Bank v. Case*, 99 U. S. 268, 25 L. ed. 448.

⁸³ Rev. Stat., § 5151.

⁸⁴ Rev. Stat., § 5151.

fore liable upon the basis prescribed by that statute⁸⁵ for the contracts, debts and engagements of the association; (2) that if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by said section of the statute⁸⁶ on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed; (3) that if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of said statute;⁸⁷ and (4) that the pledgee of personal property occupies toward the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor.⁸⁸ Again, one who holds shares of national bank stock, the bank being at the time insolvent, cannot escape the individual liability imposed by the statute by transferring his stock to avoid that liability, knowing or having reason to believe at the time of the transfer on the books of the bank, that it is insolvent or about to fail. A transfer with such intent and under such circumstances, is a fraud upon the creditors of

⁸⁵ Rev. Stat., § 5151.

⁸⁶ Rev. Stat., § 5151.

⁸⁷ Rev. Stat., § 5151.

⁸⁸ *Pauly v. State Loan & T. Co.*, 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. 465.

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the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee. The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts and engagements, attaches when the bank becomes insolvent; and the shareholder cannot, by transferring his stock, compel creditors to surrender this security as to him, and force the receiver and creditors to look to the person to whom his stock has been transferred. If the bank be solvent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the transfer is made is immaterial, as a transfer under such circumstances does not impair the security given to creditors; but if the bank be insolvent, the receiver may, without suing the transferee and litigating the question of his liability, look to every shareholder who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of his stock in order to escape the individual liability to which the statute subjected him.⁸⁹ The State creating a corporation may determine how transfers of stock shall be made and evidenced, and a change in the law imposing no restraint upon the transfer, but only affecting the method of procedure, does not impair the obligation of the charter contract within the meaning of the contract clause of the Federal Constitution, therefore, a State statute⁹⁰ is not void as to stockholders who purchased stock prior thereto and sold it thereafter, because it required a statement of the transfer of stock to be filed in the office of the Secretary of State in order to relieve the transferrer of a stockholder's liability, the

⁸⁹ *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. 274. Whether the bank, being in fact insolvent, the transferrer is liable to be treated as a shareholder in respect of its existing contracts, debts and engagements, if he believed in good faith, at the time of the transfer that the bank was solvent, was not decided; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible. *Id.*

⁹⁰ Corp. Law of Kan. of 1899 given in note to report of case cited in next following note.

act not depriving him of any defense that might be made at the time the stock was acquired. In becoming a stockholder of a corporation one does not acquire as against the State a vested right in any particular mode of procedure for enforcement of liability, but it is assumed that parties make their contracts with reference to the existence of the power of the State to regulate such procedure. Methods of procedure in actions on contract that do not affect substantial rights of parties are within the control of the State, and the obligation of a stockholder's contract is not impaired within the meaning of the contract clause of the Federal Constitution by substituting for individual actions for statutory liability a suit in equity by the receiver of an insolvent corporation.⁹¹

⁹¹ *Henley v. Meyers*, 215 U. S. 373, 30 Sup. Ct. —, 54 L. ed. —.

CHAPTER XVII

PARTIES CONTINUED—CREDITORS—STOCKHOLDERS—RIGHTS, LIABILITIES AND REMEDIES OF, CONTINUED.

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| <p>§ 278. Suits by Creditors — Parties, Generally.</p> <p>279. "Trust Fund" Doctrine— Capital Stock — Unpaid Subscriptions.</p> <p>280. When Unpaid Subscriptions or Unpaid Stock Are and Are Not Assets.</p> <p>281. Stockholders' Liability to Creditors, Generally.</p> <p>282. Same Subject.</p> <p>283. Subscriptions to Aid Organization — Fictitious and Colorable Subscriptions— Defense of Illegality of Corporate Scheme.</p> <p>284. Whether Stockholders' Liability Contractual, Statutory or Penal.</p> <p>285. Right of Action by Stockholder After Receiver Appointed.</p> <p>286. Liability of Nonresident Stockholder.</p> <p>287. Liability of Stockholders— Pleading—What Must Be Shown, Generally.</p> <p>288. Liability of Stockholders to Creditors — Unpaid Subscriptions or Stock.</p> <p>289. Same Subject.</p> <p>290. Liability of Stockholders— Unpaid Subscriptions — Parties.</p> <p>291. Liability of Stockholders to Creditors Where Stock Received Without Consideration or for Less Than Its Value—" Bonus Stock."</p> | <p>§ 292. Same Subject Continued— Stockholders' Rights.</p> <p>293. Consideration for Issue of Stock — Property, etc. — When Payment in Stock to Contractor Is Not a Stock Subscription.</p> <p>294. Stock Issued for Property— Valuation Should Be Fair and Just — Necessity of Good Faith in Transaction.</p> <p>295. Stock Issued for Property— Material Overvaluation— Stockholders Not Necessarily Liable to Creditors Therefor—Good Faith.</p> <p>296. Stock Issued for Property— Shareholder May Be Liable Where Overvaluation Shows Fraud Upon Creditors Though None Intended.</p> <p>297. Stock Issued for Property— Valueless Property—Material Overvaluation.</p> <p>298. Stock Issued for Property Which Subsequently Becomes Valueless or Consideration Fails.</p> <p>299. Judgment Creditors—Stockholders' Liability to, for Unpaid Stock—Parties.</p> <p>300. Amount of Creditor's Recovery on Stock May Be Limited by His Knowledge</p> |
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309. Stockholders' Liability—Dissolution as Condition Precedent to Enforcing Same.
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311. Judgment Creditor's Right to Sue—Parties — Conditions Precedent.
312. Order of Court Requiring Remedies To Be Exhausted—Statute Limitations.

§ 278. Suits by Creditors—Parties, Generally.

A single creditor of a corporation can, by a suit at law, enforce his own claim alone against any single shareholder of a corporation upon a dissolution of the company to the amount of the par value of the shares held by such person at the time of the dissolution, without resort to a court of equity, and without suing on behalf of himself and all other creditors of the company, and without joining all the stockholders of the company as parties defendant.¹ So the individual liability of stockholders may be enforced in the Federal Circuit Court in an action at law in accordance with State statutory provisions giving new rights and remedies.² But a creditor of a corporation

¹ Gibbs v. Davis, 27 Fla. 531, 8 So. 633.

² Borland v. Haven (U. S. C. C.), 37 Fed. 394, writ of error dismissed (mem.), 159 U. S. 255, 40 L. ed. 140, 15 Sup. Ct. 1039.

cannot maintain an action at law for his own exclusive benefit to enforce the liability imposed by the Stock Corporation Law of New York,³ upon stockholders, but his remedy is to bring suit in equity on behalf of himself and all other creditors, to enforce such liability. As the law existed prior to the amendment of 1901 a creditor of the corporation could maintain an action to enforce the statutory liability for his individual benefit. This right is preserved to a creditor of a corporation whose claim matured four months prior to the time when the amendment of 1901 went into effect. The plaintiff in such an action need not allege that a judgment has been obtained and an execution returned unsatisfied where a complaint alleges that the corporation has been dissolved, and that the judgment of dissolution enjoined all creditors from instituting any action against the corporation to enforce their claims.⁴ Where a bank charter provided that on the failure of the bank "each stockholder shall be liable and held bound * * * for any sum not exceeding twice the amount of * * * his * * * shares," it was held (1) that a suit in equity by or for all the creditors was the appropriate mode of enforcing the liability incurred on such failure; (2) that if an action at law were maintainable by one creditor, the stockholders must be separately sued as their liability was several.⁵ No repeal of the charter of a corporation can impair or take away the remedy of a creditor against it for a previously incurred liability, or affect a pending suit against it where the State statute so provides.⁶

Under the Stock Corporation Law of New York, governing

³ N. Y. Laws, 1890, chap. 564, § 54, as amended by Laws, 1892, chap. 688, and Laws, 1901, chap. 354. See Laws, 1909, chap. 61, § 56, Birdseye's Cumming & Gilbert's Consol. L. of N. Y. Ann., p. 5773.

⁴ Lang v. Lutz, 82 N. Y. Supp. 319, 83 App. Div. 534, aff'd in 180 N. Y. 254.

⁵ Terry v. Little, 101 U. S. 216, 25 L. ed. 864, citing and approving Pollard v. Bailey, 20 Wall. (87 U. S.) 520, 22 L. ed. 376. See Brunswick Terminal Co. v. National Bank, 99 Fed. 639; Wechselberg v. Flour City National Bank, 64 Fed. 94.

⁶ Blake v. Portsmouth & Concord Rd., 39 N. H. 435.

the liabilities of holders of capital stock not fully paid, etc.,⁷ the obligation imposed upon stockholders is personal to the creditors and can only be enforced in an action by them or by someone directly representing them. Such liability cannot be enforced by an assignee for the benefit of creditors of a corporation. The liability thus imposed is a contractual liability, not between the corporation and its stockholders, but between the creditors and the stockholders. It is a personal right vested in the creditor, not a right which vested in the corporation, and, therefore, not a right that either the corporation or its assignee can enforce.⁸ If a creditor obtains a decree in another State directing a receiver to collect claims of such a character, the former's right to individually sue stockholders becomes merged in the decree.⁹ Where a creditor's bill is brought by a nonresident in a Federal Court to subject property of a debtor, according to priorities, to all liens resting upon it, the court is not bound by comity or other consideration to stay the suit because another suit is already pending in a State Court against the same defendant debtor to subject the same property, but in which it is only sought to settle the relative priorities of the liens of two of the lien creditors, no others of the lien creditors of the defendant being parties in that suit. If the property itself were actually in the corporeal possession of the State Court, in the person of a receiver or other officer, that would be conclusive and the Federal Court would not and could not interfere; but where such is not the fact, the only duty of the Federal Court is to inquire whether the controversy exhibited by the bill was within the cognizance of the State Court when the bill before the Federal Court was brought, for if it was then that fact would conclude the latter court.¹⁰

⁷ N. Y. Laws, 1890, chap. 564, § 54, as amended by Laws, 1892, chap. 688, § 54, and by Laws, 1901, chap. 354, Laws, 1909, chap. 61, § 56, Birdseye's Cumming & Gilbert's Consol. L. of N. Y. Ann., p. 5773.

⁸ Thompson v. Knight, 77 N. Y. Supp. 599, 74 App. Div. 316.

⁹ Castleman v. Templeman, 87 Md. 546, 40 Atl. 275, 41 L. R. A. 367.

¹⁰ Hay v. Alexandria & Washington Rd. Co., 4 Hughes (U. S. C. C., 1882), 331.

§ 279. "Trust Fund" Doctrine—Capital Stock—Unpaid Subscriptions.

It is the settled doctrine of the Federal Supreme Court that unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of creditors, which may not be given away or disposed of by it without consideration or fraudulently to the prejudice of creditors.¹¹ So it is held that even before a corporation's insolvency unpaid subscriptions create a fund in equity for the benefit of creditors of the corporation.¹² And balances unpaid on subscriptions are a trust fund for benefit of creditors.¹³ And the special individual liability of a stockholder in a banking corporation or institution, superadded to his ordinary liability by the Constitution of Nebraska,¹⁴ is for the creation of a trust fund for the benefit of all creditors of the banking corporation or institution in which stock is held, and an action to render available such liability must be prosecuted by one creditor or such corporation or institution for the benefit of all other creditors, or by the receiver of such corporation or institution when there is a receiver.¹⁵ But an active corporation, finding its original capital impaired by loss or misfortune, may for the purpose of recuperating itself, and of producing new conditions for the successful prosecution of its business, issue new stock, and put it upon the market, and sell it for the best price that can be obtained; and in such case no trust in favor of a creditor arises against the purchaser who, in good faith buys, for less than par.¹⁶ Under an Alabama decision the "trust fund" doctrine, whereby a corporation's

¹¹ *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. ed. 104. Case explained in *Camden v. Stuart*, 144 U. S. 104, 36 L. ed. 363, 12 Sup. Ct. 585.

¹² *Albright v. Texas, S. F. & N. R. Co.*, 8 N. M. 422, 46 Pac. 448, rev'g 8 N. M. 110, 42 Pac. 73.

¹³ *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

¹⁴ Const. of Neb., § 7, Art. 11, "Corporations" holds that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

¹⁵ *Farmers' Loan & Trust Co. v. Funk*, 49 Neb. 353, 68 N. W. 520.

¹⁶ *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227, 9 Ry. &

capital stock and debts due it on subscriptions to such stock are a trust fund available for the payment of its debts, does not exist so as to render available in equity, in satisfaction of a judgment against it, debts due on subscriptions.¹⁷ Under a Minnesota decision the capital of a corporation is its own property, which, unless prohibited by charter, it may use and dispose of the same as a natural person. It is not held in trust for creditors except in the sense that there can be no distribution of it among stockholders without provision being first made for the payment of corporate debts, and, as in the case of a natural person, any disposition of it in fraud of creditors is void; and in this respect there is no distinction between unpaid capital and paid capital, between "stock subscriptions" and any other assets of the corporation.¹⁸

§ 280. When Unpaid Subscriptions or Unpaid Stock Are and Are Not Assets.

Unpaid subscriptions become assets, upon the corporation becoming insolvent, which are available for the payment of creditors who have extended credit to the corporation in reliance upon an agreement made between the corporation and its stockholders that they need pay in only a certain proportion of the amount of the stock subscribed; such creditors having no knowledge of any other or different agreement.¹⁹ And if the statute requires the articles of a corporation to be recorded in the office of the county recorder and the Secretary of State, such record gives notice of the liability of stockholders to the extent of the proportionate amount of the par value of the stock which the subscribers are required to pay in,

Corp. L. J. 362. Case explained in *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. ed. 363.

¹⁷ *Henderson v. Hall*, 134 Ala. 455, 32 So. 840.

¹⁸ *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 45 Alb. L. J. 277, 36 Am. & Eng. Corp. Cas. 206.

"*Trust-fund*" doctrine that the capital of a corporation is a trust fund for the payment of its debts considered and criticised in *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 45 Alb. L. J. 277, 36 Am. & Eng. Corp. Cas. 206.

¹⁹ *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307.

so that, upon the corporation becoming insolvent, the unpaid portion of such stock does not constitute an asset for the benefit of the corporation creditors.²⁰

§ 281. Stockholders' Liability to Creditors, Generally.

Within the common-law rule there was no individual liability of stockholders in a corporation for its debts.²¹ And in the absence of any legislation a stockholder is not liable to creditors of the corporation after he has fully paid up his stock.²²

But where a State statute²³ makes each of the stockholders and directors of an incorporated co-operative association individually liable for goods sold the corporation, "to the amount of his capital stock therein, and no more," it imposes a liability equal to and over and above the full-paid value of the stock held.²⁴

Holders of preferred stock are subject to the statutory liability, equally with the common stockholders, in an action by creditors of an insolvent corporation to enforce the statutory liability of stockholders.²⁵

If a State statute repeals a former statute, which made the stock of stockholders in a chartered company liable to the

²⁰ Bent v. Underdown, 156 Ind. 516, 60 N. E. 307.

²¹ Gordor v. Connor, 56 Neb. 781, 77 N. W. 383, 9 Am. & Eng. Corp. Cas. (N. S.) 175.

²² Bicknell v. Altman (Kan., 1909), 105 Pac. 694. In this case several stockholders of a Kansas corporation, which was organized in 1905, guaranteed its notes, and, on its default, were compelled to pay them. The corporation being insolvent its affairs were wound up by a receiver. Some of the stockholders, including the guarantors of the notes, voluntarily contributed an amount equal to their stock to increase the fund from which the corporate debts were to be paid. The assets of the corporation, with this increase, being insufficient to meet its obligations, the guarantors brought action against the stockholders who had refused to make any such contributions, seeking to recover from each a sum equal to the amount of his stock (which was fully paid up) so far as might be necessary for their own reimbursement. The trial court overruled a demurrer to a petition stating these facts, and defendant appealed. It was held that the petition stated no cause of action and the judgment was reversed with directions to sustain the demurrer.

²³ 1 How. Mich. Stat., § 3940.

²⁴ Kirkpatrick v. Bessalo, 116 Mich. 657, 5 Det. L. News, 97, 74 N. W. 1042.

²⁵ Railroad Company v. Smith, 48 Ohio St. 219, 31 N. E. 743.

corporation's debts, it is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts, and void. And this is so, even though the liability of the stock is in some respects conditional only; and though the stockholder was not made, by the statute repealed, liable, in any way, in his person or property generally, for the corporation's debts.²⁶

§ 282. Same Subject.

In Minnesota a stockholder's liability is fixed and measured by the Constitution.²⁷ And under the Kansas Constitution the liability of stockholders for the debts of the corporation is limited to the amount of their stock.²⁸ But in a State having a constitutional provision imposing liability on stockholders, if the legislature intended those of a new corporation created by it should be exempt, it would express the intention directly, and not commit it to disputable inference from provisions

²⁶ *Hawthorne v. Calef*, 2 Wall. (69 U. S.) 10, 17 L. ed. 776.

²⁷ *Bernheimer v. Converse*, 206 U. S. 516, 528, 529, 51 L. ed. 163, 27 Sup. Ct. 755. The court, per Mr. Justice Day, said: "The stockholders' liability in Minnesota, as in some other States, has its origin in a constitutional provision, and arises under section 3, article X of the constitution of the State. The language is: 'Liabilities of stockholders. Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him.'

"The courts of Minnesota have held that a stockholder's liability is, therefore, fixed and measured by the constitution. *Willis v. Mabon*, 48 Minn. 140; *McKusick v. Seymour, Sabin & Co.*, 48 Minn. 158. It is apparent from a consideration of this constitutional provision that its purpose was to make a stockholder liable to the creditors of the corporation in an amount not exceeding the par value of the stock held by him, and thus secure for the benefit of such creditors, in addition to the assets and property which the corporation might possess, the liability of those who hold its stock in a sum necessary to make good any deficiency between the amount of the assets and the debts within the limitation stated. It is evident from the general language used in this constitutional provision that while a remedy might have been worked out in the courts of equity in the State, it was proper if not necessary that a statute should be passed to make more effectual the liability thus secured by the constitution."

²⁸ *Bicknell v. Altman* (Kan., 1909), 105 Pac. 694.

As to Constitution of Nebraska see *Wyman v. Bowman* (U. S. C. C. A.), 127 Fed. 257.

which apply by name to the corporation.²⁹ The sale, though made in good faith, by a stockholder in a corporation of his stock, only a small part of the par value of which has been paid, does not terminate his liability for the existing debts of the company, under a code enactment³⁰ providing that the transfer of shares is not valid except as between the parties unless it is regularly entered on the books of the company, but that such transfer shall not in any way exempt the person making it from any liability of the corporation created prior thereto, and under a section of said statute,³¹ providing that nothing contained in such chapter shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them or transferred by them for the purpose of defrauding creditors.³² Stockholders and members may be held liable as partners for the acts and contracts of a body of persons who, by reason of their failure to comply with statutory conditions precedent to organization, have never become even a *de facto* corporation.³³ The liability of stockholders of national banks is conditional, and the right to sue does not obtain until the comptroller has acted; his order is the basis of the suit.³⁴

§ 283. Subscriptions to Aid Organization—Fictitious and Colorable Subscriptions—Defense of Illegality of Corporate Scheme.

If, in order to aid the scheme of organization, stock is subscribed for in the wife's name by her husband with the intent that such stock should be delivered to her by the promoters, but she does not claim any stock, the corporate members cannot hold her liable for the fraud of such promoters, in which

²⁹ *Minneapolis & St. Ry. Co. v. Gardner*, 177 U. S. 332, 44 L. ed. 793, 20 Sup. Ct. 656.

³⁰ Iowa Code, 1873, § 1078.

³¹ Iowa Code, 1873, § 1082.

³² *White v. Green*, 105 Iowa, 176, 74 N. W. 928, 70 N. W. 182, 8 Am. & Eng. Corp. Cas. (N. S.) 414.

³³ *Bergeron v. Hobbs*, 96 Wis. 641, 71 N. W. 1056.

³⁴ *McClaine v. Rankin*, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410.

she did not participate, in concealing the fact that commissions were to be paid them upon the amount of the purchase price of property which constituted the corporation's capital stock.³⁵

Fictitious or colorable subscriptions to stock, made and used with intent to induce others to subscribe, with the secret understanding that no liability shall attach to the subscribers, or that they shall be allowed to withdraw, are as binding on the subscribers as if originally made in good faith, and the existence of such subscriptions does not operate as a release of *bona fide* subscribers.³⁶ And if debts have been contracted upon the strength of the stock subscriptions the stockholders cannot avoid their liability to creditors by setting up the illegality of the corporate scheme when the same was not apparent upon the face of the subscription contract or set forth in the prospectus referred to in the same.³⁷

§ 284. Whether Stockholders' Liability Contractual, Statutory or Penal.

Under a decision in the Federal Supreme Court, the liability imposed upon stockholders in corporations by a State constitutional provision, that "dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes," and by statute in the same State, though statutory in origin, is contractual in its nature; and an action on this liability, not being one to enforce a penal State statute, but only to secure a private remedy, can be maintained in any court of competent jurisdiction, whether Federal or State.³⁸ It is said in a California

³⁵ Cook v. Southern Columbian Climber Co., 75 Miss. 121, 21 So. 795.

³⁶ Wilson v. Hundley, 96 Va. 96, 4 Va. L. Reg. 317, 30 S. E. 492.

³⁷ Cardwell v. Kelly, 95 Va. 570, 28 S. E. 953, 40 L. R. A. 240. See Sprague v. National Bank of America, 172 Ill. 149, 60 N. E. 19, 42 L. R. A. 606.

³⁸ Whitman v. Oxford Nat. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587, cited in Bernheimer v. Converse, 206 U. S. 516, 529, 51 L. ed. 163, 27 Sup. Ct. 755; Christopher v. Norvell, 201 U. S. 216, 228, 50 L. ed. 732, 26

§ 284 PARTIES CONTINUED—CREDITORS—STOCKHOLDERS—

decision that: "It may, therefore, be concluded with much certainty that under the Kansas statute the liability is in contract, and is not penal; that the rights of the judgment creditor and the reciprocal rights and duties of the stockholder are

Sup. Ct. 495; *McClaine v. Rankin*, 197 U. S. 154 (in dissenting opinion), 166, 49 L. ed. 702, 25 Sup. Ct. 410 (this case holds that although a statutory liability may be contractual, or quasi-contractual, in its nature, an action given by statute is not necessarily to be regarded as brought on simple contract, or breach of simple contract); *Platt v. Wilmot*, 193 U. S. 602, 612, 24 Sup. Ct. 542, 48 L. ed. 809 (holding that although a double liability of a stockholder of a moneyed corporation may be contractual in its nature, if it is statutory in origin it is a liability created by statute within the meaning of § 394 of the New York Code of Civil Procedure); *Evans v. Nellis*, 187 U. S. 271, 277, 47 L. ed. 173, 23 Sup. Ct. 74; *Ward v. Joslin*, 186 U. S. 142, 151, 22 Sup. Ct. 807, 46 L. ed. 1093; *McDonald v. Thompson*, 184 U. S. 71, 74, 46 L. ed. 437, 22 Sup. Ct. 297; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 641, 44 L. ed. 619, 20 Sup. Ct. 506; *Converse v. Mears* (U. S. C. C.), 162 Fed. 767, 770, 774; *Harrison v. Remington Paper Co.*, 140 Fed. 388, 390; *Anglo-Amer. Land, M. & A. Co. v. Lombard*, 132 Fed. 729; *American Nat. Bank v. Supplee*, 115 Fed. 658; *Whitman v. Citizens' Bank*, 110 Fed. 506.

See also the following cases:

United States: *Wyman v. Bowman*, 127 Fed. 257.

California: *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622 (liability is in contract and not penal, and action to enforce same is transitory).

Illinois: *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804.

Maryland: *Hager v. Cleveland & Bassett*, 36 Md. 476 (is in nature of contract between company creditor and stockholder).

Michigan: *Warren*, In re, 52 Mich. 557, 561.

Minnesota: *Hanson v. Davison*, 73 Minn. 454, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676 (is not penal or statutory but purely contractual).

New Hampshire: *Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538, 46 L. R. A. 467, citing numerous cases (*is statutory and not contractual*, and cause of action is local and not transitory).

New York: *Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108, 45 L. R. A. 551 (common-law contractual liability exists to pay for stock; subscription to stock creates a debt); *Lowry v. Inman*, 46 N. Y. 119; *Howarth v. Angle*, 57 N. Y. Supp. 187, 39 App. Div. 151, aff'd in 162 N. Y. 179, 30 Civ. Proc. R. 306, 56 N. E. 489, 47 L. R. A. 725 (resident stockholder of foreign corporation; liability contractual).

Pennsylvania: *Aultman's Appeal*, 98 Pa. St. 505, 512, 513 (rests on contract express or implied and not penal).

West Virginia: *Nimick & Co. v. Mingo Iron Works Co.*, 25 W. Va. 184 (liability is not in the nature of a penalty or forfeiture but it arises out of the implied promise of the stockholder to assume and discharge the individual liability imposed by the statute under which the corporation was created).

measured by this statute, and that, under the law, the creditor who has obtained judgment in Kansas against a corporation, upon which judgment an execution has been issued and returned *nulla bona*, may pursue the stockholder in an action at law wherever jurisdiction of his person may be obtained, and secure judgment against him; that he may sue one or many of the stockholders; that he may take judgment against them without first having obtained judgment against the corporation in the State in which his action against the stockholders is commenced; and that the measure of the individual stockholder's liability is the face value of his shares, together with the amount of his unpaid subscription thereon."³⁹ Under a Florida decision the statutory liability of a shareholder for the company's debts upon its dissolution and to an amount equal to the par value of the stock held at the time of dissolution, is assumed by the stockholder by the act of subscription for stock, and, therefore, arises *ex contractu*, and, upon dissolution of the company, a creditor thereof can enforce such liability by suit directly against the shareholder without joining the company in the suit, and without first exhausting his remedy at law against the company.⁴⁰ Under a Minnesota decision a stockholder's liability under its laws is contractual and enforceable on that basis and not on the ground that it is statutory or penal.⁴¹

The nature of the liability imposed on stockholders of a cor-

Stockholder's liability is contractual, incepted when debt incurred. Hill v. Graham, 11 Colo. App. 536, 543, 53 Pac. 1060.

It is said in *Bernheimer v. Converse*, 206 U. S. 516, 529, 51 L. ed. 163, 27 Sup. Ct. 755, per Mr. Justice Day, that: "It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature and, as such, capable of being enforced in the courts not only of that State, but of another State and of the United States. *Whitman, etc., v. Oxford Nat. Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. 477; although the obligation is not entirely contractual and springs primarily from the law creating the obligation. *Christopher v. Norvell*, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. 502."

³⁹ *Ferguson v. Sherman*, 116 Cal. 169, 176, 47 Pac. 1023, 37 L. R. A. 622, per Henshaw, J.

⁴⁰ *Gibbs v. Davis*, 27 Fla. 531, 8 So. 633.

⁴¹ *Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254.

poration by the Constitution of Minnesota, declaring that each stockholder shall be liable to the amount of stock held or owned by him, as to whether such liability is wholly statutory or partially contractual, and therefore transitory, is a matter of general law as to which the Federal Courts sitting in Wisconsin are not bound to follow the decisions of the Wisconsin Supreme Court either as a matter of comity, or under the Revised Statutes,⁴² providing that the laws of the several States are to be regarded as rules of decision in trials at common law so far as applicable.⁴³

The liability imposed by the Stock Corporation Law of New York⁴⁴ on account of unpaid stock is held to be wholly statutory, and in the nature of a penalty. The right to enforce such liability is vested in the creditors and not in the corporation, and does not pass to a trustee in bankruptcy.⁴⁵

§ 285. Right of Action by Stockholder After Receiver Appointed.

The appointment of a receiver precludes an action by a stockholder to recover corporate property; such a suit, whether against the officers of the corporation or other persons must be instituted by the receiver, and in case of his refusal to sue application should be made to the court to compel him to do so.⁴⁶ And after a State Court has appointed a receiver of all the property of a corporation, and while the receivership exists, stockholders of the corporation cannot bring a suit against the officers in a court of the United States for fraudulent misappropriation of its property, without making the receiver as well as the corporation a party to the suit; although

⁴² § 721, U. S. Comp. Stat., 1901, p. 581.

⁴³ Syllabus in *Converse v. Mears* (U. S. C. C.), 162 Fed. 767.

⁴⁴ N. Y. Laws, 1890, chap. 564, § 54, as amended by Laws, 1892, chap. 688, and Laws, 1901, chap. 354, Laws, 1909, chap. 61, § 56, 5 *Birdseye's Cumming & Gilbert's Consol. L. N. Y. Annot.*, p. 5773.

⁴⁵ *Rathbone v. Ayer*, 82 N. Y. Supp. 235, 84 App. Div. 186.

⁴⁶ *Neun v. Blackstone Bldg. & L. Assoc.*, 149 Mo. 74, 50 S. W. 436.

That capacity of corporation to sue is suspended for time being, see Davis v. Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494; *Boston & Montana Consol. Copper & Silver Min. Co.*, 24 Mont. 142, 60 Pac. 990.

the State Court has denied a petition of the receiver for authority to bring the suit, as well as an application of the stockholders for leave to make him a party to it.⁴⁷

An action for the enforcement of the individual liability of the stockholders of a banking corporation must be prosecuted by one creditor for the benefit of all, or by the receiver of the corporation. And a creditor may not intervene in such an action, instituted by the receiver, at least where it is not made to appear that the receiver is not prosecuting the case in good faith for the best interests of the creditors, or in some way has disregarded or violated the duties of his trust in that regard.⁴⁸

§ 286. Liability of Nonresident Stockholder.

Where an action is brought wherein the amount due from stockholders and for which they are individually liable is determined, although the court has no jurisdiction over a nonresident stockholder, an ancillary action to enforce his liability may be maintained.⁴⁹ A stockholder in one State may be sued therein by a creditor where the former holds stock in an insolvent bank in another State, the statute of which makes a stockholder primarily liable to each corporation creditor for such proportionate part of the debt as the stock owned by a stockholder sustains to the entire amount of capital stock subscribed; such a statutory provision does not create a penalty.⁵⁰

⁴⁷ *Porter v. Sabin*, 149 U. S. 472, 37 L. ed. 815, 13 Sup. Ct. 1008.

⁴⁸ *Brown v. Brink*, 57 Neb. 606, 78 N. W. 280.

⁴⁹ *Hanson v. Dayton*, 73 Minn. 454, 76 N. W. 254.

⁵⁰ *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62, under Civ. Code Cal., § 362; insolvent bank was in California and suit was brought in Arkansas against an Arkansas stockholder in said bank.

Examine in this connection the following cases:

United States: *Kisseberth v. Prescott*, 91 Fed. 611.

California: *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622.

Illinois: *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804.

Iowa: *Latimer v. Citizens' State Bank*, 102 Iowa, 162, 71 N. W. 225, 7 Am. & Eng. Corp. Cas. (N. S.) 25.

Massachusetts: *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, citing a number of cases.

While the liability of nonresident stockholders for taxes on his stock may not be expressed in the charter of the company if it existed in the general laws of the State at the time of the creation of the corporation or the extension of its charter, and the Constitution of the State also contained at such times the reserved right to alter, amend and repeal, those provisions of the Constitution and general laws of the State are as much a part of the charter as if expressly embodied therein.⁵¹

§ 287. Liability of Stockholders—Pleading—What Must Be Shown, Generally.

A petition, in an action by the creditors of an insolvent corporation to enforce the statutory liability of its stockholders, which avers that each of its defendants, except the corporation, is the holder of a specified number of shares of the capital stock of the corporation, contains a sufficient allegation that the defendants are stockholders. It need not be averred, in terms, that the defendants are owners of the stock held by them.⁵²

A complaint in an action brought by a creditor of a corporation against a stockholder whose stock is not fully paid in, is demurrable where the allegation as to the defendant's indebtedness upon the stock relates to the time when the indebtedness of the corporation to the plaintiff was contracted, and not to the time when the plaintiff recovered judgment against the corporation upon such indebtedness.⁵³ To establish a cause of action under the provision of the General Manufactur-

Michigan: *Western National Bank of N. Y. v. Lawrence*, 117 Mich. 669, 76 N. W. 105 (liability is contractual and not penal).

New Hampshire: *Crippen v. Loughton*, 69 N. H. 540, 46 L. R. A. 467, 44 Atl. 538.

New York: *Stoddard v. Lurn*, 159 N. Y. 265, 53 N. E. 1108, 45 L. R. A. 551.

Rhode Island: *Hancock Nat. Bank v. Farnum*, 20 R. I. 466, 40 Atl. 34 (liability is statutory and not contractual).

⁵¹ *Corry v. Mayor & Council of Baltimore*, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. 297.

⁵² *Railroad Company v. Smith*, 48 Ohio St. 219, 31 N. E. 743.

⁵³ *Dyer v. Drucker*, 95 N. Y. Supp. 749, 108 App. Div. 238.

ing Act of 1848 of New York,⁵⁴ which made the stockholders of a company organized under it individually liable to the creditors of the company, to the amount of their stock, for all its debts, until the whole amount of the capital stock had been paid in, all that was required was to show that a valid debt was contracted before the capital stock was paid in, either in cash or in property honestly regarded as a fair equivalent to cash. The liability covered "all debts and contracts made by said company," irrespective of the circumstances under which they were made. There was no exemption from liability, because credit was imprudently given by the creditor, or because he gave credit upon the supposition that the property of the corporation was sufficient to pay its debts.

By proof that the stock of the company had been issued as full-paid stock which had not been fully paid, a legal fraud was established; it was not necessary to show otherwise an actual fraudulent intent. So, also, if it were shown that the stock had been issued in payment for property, with knowledge on the part of its trustees that the value of the property was much less than the amount of the stock, no other fraudulent intent than that which is evidenced by the action of the trustees needed to be shown to authorize a recovery.⁵⁵

The liability imposed by the above mentioned statute⁵⁶ upon stockholders of a company organized thereunder, for a failure to file the proper certificate of payment, upon an increase of its capital stock, attached only to the increase, and only stockholders holding the increased stock were liable; the provision had no reference to, or effect upon, the original capital and its holders. A creditor of the corporation, who sought by action to enforce such a liability, was required to allege and prove the facts showing that the conditions of the statute were exactly met by his case; no presumptions or in-

⁵⁴ § 10, chap. 40, Laws of 1848, law repealed by Laws, 1909, Genl. Corp. L. § 330.

⁵⁵ *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302, 35 N. Y. St. Rep. 357, 26 N. E. 538, 9 Ry. & Corp. L. J. 270, aff'g 46 Hun, 248, 11 N. Y. St. Rep. 533.

⁵⁶ § 10, chap. 40, Laws, 1848, law repealed by L. 1909, Genl. Corp. L. § 330.

ferences could be indulged in. Unless, therefore, the stockholder proceeded against was proved to hold some of the increased stock, he was not brought within the statute.⁵⁷ It is decided that it must be shown that there is a willful and fraudulent neglect of the corporate interests on the part of the directors or managing agents to enable stockholders to sue or defend in their own names.⁵⁸ Where it can fairly be gathered from the allegations of a complaint in a stockholder's action that the officers and directors of the corporation have made use of relations of trust and confidence in order to secure or promote some selfish interest, a court of equity will require the defendant stockholders to answer in regard to the facts.⁵⁹

§ 288. Liability of Stockholders to Creditors—Unpaid Subscriptions or Stock.

Creditors of a corporation may hold stockholders liable for the amount of their unpaid subscriptions.⁶⁰ And a new liability is not created by a statute under which creditors may hold stockholders liable for the amount of their unpaid subscriptions, but said enactment is merely declaratory of the common law.⁶¹

By the common law the stockholders of an incorporated company are liable to pay their subscriptions, if such payment be necessary, to discharge the debts of the company. A distinction is drawn between one who holds his stock by transfer and an original subscriber. The former may, in the absence of any fraudulent purpose, discharge himself from liability for unpaid installments by due transfer of his shares, while the latter cannot obtain immunity in that way. The subscription to the stock and the acceptance of a certificate for the shares constitute a contract between the subscriber and the

⁵⁷ *Griffeth v. Green*, 129 N. Y. 517, 42 N. Y. St. Rep. 101, 29 N. E. 838.

⁵⁸ *Home Min. Co. v. McKibben*, 60 Kan. 387, 56 Pac. 756.

⁵⁹ *Lawrence v. Weber*, 65 Misc. (N. Y.) 603.

⁶⁰ *Miller v. Higginbotham*, 29 Ky. L. Rep. 547, 93 S. W. 655; *Shields v. Hobart*, 172 Mo. 491, 72 S. W. 669.

⁶¹ *Taylor v. Cummings* (U. S. C. C.), 127 Fed. 108; *Hurd's Ill. Rev. Stat.*, 1893, chap. 32, § 23.

company by which the subscriber engages to pay the remaining installments on demand by the corporation. From this agreement the subscriber cannot recede without the consent of the company.⁶² So a liability under a constitutional provision making stockholders liable individually for corporate debts in an amount equal to their unpaid subscriptions after exhaustion of the corporate property, is a contractual liability based upon their subscription agreement.⁶³ Stockholders are also liable to creditors for their subscriptions where they have ratified the same by accepting dividends after compliance by the corporation with statutory conditions precedent to doing business even though they became shareholders before such compliance; it constitutes no ground of exemption from liability that they acquired their stock before the corporation had authority to issue it.⁶⁴ So subscribers are chargeable with liability to creditors for corporate debts for the difference between the par value of stock and the percentage thereof of payments made thereon, notwithstanding a decree or specific performance of subscription contracts authorizing the issue to subscribers of certificates on payment of such *pro rata* percentage, where the creditors were not parties and did not have any rights involved in the action between the stockholders in which such decree was rendered.⁶⁵

§ 289. Same Subject.

The trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any decree short of actual payment in good faith.⁶⁶ Nor does a stockholder's statutory liability for the unpaid amount of his stock depend

⁶² Hood v. McNaughton, 54 N. J. L. 425, 24 Atl. 497.

⁶³ Wyman v. Bowman (U. S. C. C. A.), 127 Fed. 257, Const. Neb., art. 11b, § 4. See § 282, herein.

⁶⁴ Murphy v. Wheatley, 102 Md. 501, 63 Atl. 62.

⁶⁵ Bates v. Great Western Teleg. Co., 134 Ill. 536, 25 N. E. 521.

⁶⁶ Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. ed. 363. The court affirmed the judgments of the court below against stockholders in these cases whose subscriptions for stock in the corporation were shown to be in part unpaid.

upon whether a creditor did or did not, at the time he extended credit to the corporation, have knowledge that the corporate stock was partly unpaid.⁶⁷ It is held in a Minnesota case, where the action was by an assignee for creditors of a corporation to recover the amount of a stockholder's unpaid subscription, that even though his subscription was obtained for the real purpose of enabling the corporation to engage in gambling and selling pools on races, he could not for that reason avoid liability.⁶⁸ Creditors cannot, however, hold liable a subscriber to corporate stock where the only purpose of the subscription was to further the incorporation and there was a valid release of such subscriber after the company was incorporated and while it had no debts outstanding and the other subscribers unanimously consented to such release.⁶⁹ And where the entire authorized corporate stock has been issued to other subscribers and the corporation has been paid therefor, a mere subscriber is relieved of liability on his subscription.⁷⁰

§ 290. Liability of Stockholders—Unpaid Subscriptions—Parties.

Under a Colorado decision where stockholders are liable, under a State statute, to the extent of their unpaid stock for the corporation's debts, a stockholder and the corporation may be joined as defendants and a separate judgment obtained against the stockholder by the plaintiff in an action on an insurance policy where the corporation has discontinued its business, leaving unpaid debts.⁷¹ Under a Connecticut decision the stockholders and the administrator of a stockholder of a dissolved Missouri corporation which is without assets, and directors thereof who might be made plaintiffs but refuse to sue, may be joined as defendants, but the corporation need not be

⁶⁷ *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606. See *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953, 40 L. R. A. 240.

⁶⁸ *Augir v. Ryan*, 63 Minn. 373, 65 N. W. 640.

⁶⁹ *Scottish Security Co.'s Receiver v. Starks*, 25 Ky. L. Rep. 1722, 78 S. W. 455.

⁷⁰ *Level Land Co. v. Hayward*, 95 Wis. 109, 69 N. W. 567.

⁷¹ *Tabor v. Goss & P. Mfg. Co.*, 11 Colo. 419, 18 Pac. 537.

made a party, in an action brought in the former State by a creditor to recover the amount of his claim out of unpaid subscriptions.⁷²

Under a Kentucky decision each stockholder's liability is several and depends upon the amount of his unpaid subscription. A creditor may, therefore, sue one or more stockholders of an insolvent corporation to recover the amount of his debt, it not being necessary to make the other stockholders parties, nor need an account be taken of the other indebtedness.⁷³ Again, a successor of a trustee under a trust deed for creditors may, in his own name, bring suit against a stockholder for a call for unpaid subscriptions to pay corporate debts, such call having been approved by the stockholders.⁷⁴ The statutory liability of stockholders for debts of the corporation may be enforced through a bill by a receiver, brought in equity.⁷⁵ In the case of stockholders of a foreign corporation, if an action is brought by a creditor to enforce their statutory liability it is necessary that the corporation and all the stockholders therein should be made parties.⁷⁶

§ 291. Liability of Stockholders to Creditors Where Stock Received Without Consideration or for Less Than Its Value — "Bonus Stock."

If shares of stock are received without payment, the holder thereof may be held liable to creditors for unpaid stock where the corporation becomes insolvent.⁷⁷ So the assignee and creditors of an insolvent corporation may hold the shareholders liable to the extent of the par value of stock, with interest thereon from the time when the stock should have been paid for, where such stock is issued to and received by such stockholders without payment.⁷⁸

⁷² *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621.

⁷³ *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

⁷⁴ *Lewis v. Glenn*, 84 Va. 947, 6 S. E. 866.

⁷⁵ *Andrews v. Bacon* (U. S. C. C.), 38 Fed. 777.

⁷⁶ *Elkhart Nat. Bank v. Converse* (U. S. C. C. A.), 87 Fed. 252, 30 C. C. A. 632, 58 U. S. App. 83, aff'g 84 Fed. 76.

⁷⁷ *White v. Hook*, 87 Md. 733, 40 Atl. 901.

⁷⁸ *Shaw v. Gilbert*, 111 Wis. 65, 86 N. W. 188.

If a stockholder in a corporation who assents to an increase in the capital stock of the corporation and its gratuitous distribution among the shareholders, receives such stock as full paid stock, an obligation arises to pay for it in full, when called upon to do so by creditors whose debts are subsequent to the authorization of the increase; but this equity does not exist in favor of a creditor whose debt was contracted prior to such authorization.⁷⁹ The equitable right of creditors of a corporation to compel the holders to pay for "bonus" stock or stock given without consideration, could, under the Minnesota statute of 1878, be enforced in a sequestration proceeding upon the complaint of any interested creditor who had become a party to the proceeding. But the right of creditors to compel such holders to pay, contrary to their actual agreement with the corporation, is held to rest neither upon implied contract nor upon any trust fund doctrine but upon the ground of fraud. The fraud in such case consists in the misrepresentation as to the actual amount of capital, upon the faith of which persons have dealt with the corporation and given it credit. Therefore, it is only those creditors who have relied, or who can fairly be presumed to have relied on, the stock representing actual capital, in whose favor equity will enforce the payment of such stock; and payment can never be enforced in favor of one who became a creditor before the "bonus" stock was issued.⁸⁰ Again, if there are corporate debts and stock has been transferred to stockholders for a nominal value, creditors may hold such stockholders liable therefor to the extent of the par value of the stock if necessary to satisfy such debts.⁸¹

Shares of stock, however, in a corporation issued and sold as full paid stock, but for a sum less than its par value, are not void, but the agreement between the holder and the corpora-

⁷⁹ *Handley v. Stutz*, 139 U. S. 417, 35 U. S. 227, 11 Sup. Ct. 530, 9 Ry. & Corp. L. J. 362, case explained in *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. ed. 363.

⁸⁰ *Hospes v. Northwestern Mfg. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 45 Alb. L. J. 277, 36 Am. & Eng. Corp. Cas. 206.

⁸¹ *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 47 N. W. 726.

tion that it shall be considered and treated as paid in full is voidable as to the creditors of the corporation.⁸² If creditors have no knowledge of an arrangement whereby stock which was issued as full paid was in fact purchased at fifty per cent of the par value to enable the corporation to increase its capital and begin its business, they can hold the purchaser of such stock liable for the balance of the price unpaid up to the value of the stock so issued.⁸³

But an active corporation, finding its original capital impaired by loss or misfortune, may, for the purpose of recuperating itself, and of producing new conditions for the successful prosecution of its business, issue new stock and put it upon the market, and sell it for the best price that can be obtained; and in such case no trust in favor of a creditor arises against the purchaser who, in good faith, buys for less than par.⁸⁴

§ 292. Same Subject Continued—Stockholders' Rights.

In a case decided in the Federal Supreme Court in 1890, the principle was reaffirmed that when the interest of the public or of a stranger is to be affected by any transaction between the stockholders owning the corporation, and the corporation itself, such transaction is subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor it will be disregarded or annulled so far as it inequitably affects him. And, therefore, whenever the interest of creditors requires, those holding shares in a corporation, purporting to be, but which are shown not to have been, paid for to the extent of their face value, should be held liable to pay for such shares unless it appears that they acquired the stock under circumstances that did not give

⁸² *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. 1077, 119 N. W. 951.

⁸³ *Rickerson Roller Mill Co. v. Farrell Foundry & M. Co.* (U. S. C. C. A.), 75 Fed. 554, 43 U. S. App. 452.

⁸⁴ *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. 530, 9 Ry. & Corp. L. J. 362, case explained in *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. ed. 363.

creditors and other stockholders just ground for complaint. In this case a railroad corporation being indebted to a construction company in a certain amount, which it was unable to pay in money, had a settlement with the latter, whereby the debt was paid in shares of the stock of the railroad company of a par value equal in amount to five times the debt. The stock was taken at twenty cents on the dollar, but was not at the time worth anything in the market. One Greene, a member of the construction company, received nine hundred and ten shares as his part. Four years after said settlement, the railroad and its appurtenances were sold under a decree foreclosing a mortgage given to secure the bonds of the railroad company. One Clark, a holder of bonds issued by the railroad company two years after said settlement, obtained judgment for the amount due him, upon which execution was issued and returned six years thereafter, no property. Greene having died Clark brought suit against his administrator in one of the Circuit Courts of Iowa, sitting in probate, to hold his estate liable for the difference between what was paid for the stock and its face value, upon the ground that the stock of the corporation was a trust fund for creditors, and that as between creditors and stockholders, the latter was bound to account for its face value. The case was removed to and tried in the Federal Circuit Court where a verdict was given for the defendant. In addition to reaffirming the above-stated principle and deciding certain points relating to removal and jurisdiction, the Supreme Court held that the estate of Greene was not liable for the face value of the stock by reason of the statute of Iowa providing that nothing therein contained "exempts the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them or transferred by them for the purpose of defrauding creditors, and execution against the company may to that extent be levied upon such private property of any individual."⁸⁵ It was also decided that whether a stockholder in law or in fact, owed to the corporation any sum on the stock

⁸⁵ Revision of Iowa, 1860, § 1172; Code, 1873, § 1082.

held by him, was left by the statute to be determined in each case, upon its own circumstances, and in accordance with the principles of general law touching the rights and liabilities of creditors and stockholders; and that while the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund *sub modo* for the benefit of its general creditors, a corporation—no statute forbidding—may in good faith sell or dispose of its stock to creditors in discharge of their debts.⁸⁶ It is not necessary that a “subsequent” creditor should allege that when he dealt with the corporation he believed that the stock had been paid for, and that he gave credit on the faith of it. If in fact the creditor had knowledge of the arrangement by which the “bonus” stock, or stock given without consideration, was issued, that is a matter of defense, to be set up by the defendant stockholder. But where a creditor asks for relief against a stockholder, he should show his own equities entitling him to relief. Therefore, when it appears that he is not the original creditor, but had purchased the claims after the corporation had become insolvent, and its affairs had been placed in a receiver’s hands, he should state what he paid for the claims, or at least show that he paid a substantial consideration for them. Equity will not grant relief for the benefit of those who have bought up claims against an insolvent corporation for a nominal consideration, for the purpose of speculating on the liability of stockholders; the right of action in favor of creditors against the holders of such bonus stock does not accrue until the corporation becomes insolvent.⁸⁷ If stockholders are shown not to have paid the par value of their stock and not to have acted in good faith, a *prima facie* case is made out in favor of creditors against such stockholders for the corporate debts of an insolvent corporation.⁸⁸ The

⁸⁶ *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. 468, 9 Ry. & Corp. L. J. 322. See also *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104, 11 Sup. Ct. 476, case explained in *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. ed. 363.

⁸⁷ *Hospes v. Northwestern Mfg. Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 45 Alb. L. J. 277, 36 Am. & Eng. Corp. Cas. 206.

⁸⁸ *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 47 N. W. 726.

holder of stock issued and sold as full paid, but for a sum less than its par value, may, however, maintain an action to protect such rights as accrue to him as a stockholder.⁸⁹ But stockholders do not sustain any such injury as to constitute a basis for a suit by a sale, made in good faith, of its corporate stock at less than its par value for money and services.⁹⁰ And although a corporation has issued stock without the payment of the consideration in money, labor or property, as required by the New York Stock Corporation Law,⁹¹ one who purchases such stock from the person to whom it was illegally issued cannot recover the face value thereof from his vendor under a complaint not charging him with fraud or deceit, but seeking a recovery solely upon the ground that the stock was void because illegally issued.⁹²

**§ 293. Consideration for Issue of Stock—Property, etc.—
When Payment in Stock to Contractor Is Not a Stock Subscription.**

Where a corporation under its charter powers, pays for property purchased with its capital stock, such sale cannot be set aside in the absence of fraud, on the ground that the value of the property was not equal to the value of the stock.⁹³ If the entire capital stock is by agreement fully paid for in land transferred to the corporation and only paid-up stock is to be issued no personal liability exists against the stockholders for

⁸⁹ *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. 1077, 119 N. W. 951.

⁹⁰ *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 80 N. W. 88, 118.

⁹¹ § 42 (former Stock Corp. Law, Laws, 1890, chap. 564, as amended by Laws, 1892, chap. 688, and Laws, 1901, chap. 354), § 55, Laws, 1909, chap. 61, 5 Birdseye's, Cumming & Gilbert's Consol. Laws of N. Y., p. 5771.

⁹² *Ersfeld v. Exner*, 128 App. Div. (N. Y.) 135.

⁹³ *Bickley v. Schlag*, 46 N. J. Eq. 533, 8 Ry. & Corp. L. J. 290, 20 Atl. 250, 31 Am. & Eng. Corp. Cas. 523. A case of a bill by a judgment creditor against stockholders to compel them to liquidate, for complainants' benefit, the arrears of their subscriptions to the capital stock of the company; the real question, however, was that as between the stockholders and the corporation the stock had been paid for in full for they had transferred certain property to the corporation for stock, each share purchased being marked "issued for property purchased," and so long as the contract for sale subsisted they had an indisputable title to the stock. It was further decided in addition to the point in the text, that the proceeding must be by a general creditor's bill.

the unpaid balance of the purchase price of such land by the person who transferred the same to the corporation.⁹⁴

Where a corporation purchases the stock of goods and accounts receivable, etc., of a copartnership, agreeing to pay therefor a certain portion in cash and the balance by the issue of a certain number of shares of common and preferred stock, and certificates agreed to be delivered to certain members of the copartnership were never delivered under such agreement, and the corporation subsequently became insolvent, it was held that the parties mentioned in the agreements for the purchase of the property acquired by the corporation became entitled to receive the stipulated amounts of stock immediately upon the acceptance by the corporation of the transfer of the property, and although all the stock had not been issued, it would be treated as "issued and outstanding" within the meaning of the Stock Corporation Law of New York relating to the liability of holders of capital stock not fully paid.⁹⁵ But where it appears that the amount of stock agreed to be paid for the property transferred to the corporation greatly exceeded the value of the property, the stock is not "fully paid" within the meaning of the above statute.⁹⁶ A corporation organized under the General Manufacturing Act of New York⁹⁷ could not,

⁹⁴ *Mercer v. Park City Mineral Water Co.*, 18 Ky. L. Rep. 985, 38 S. W. 841.

⁹⁵ N. Y. Laws, 1890, chap. 564, § 54, as amended by Laws, 1892, chap. 688, and Laws, 1901, chap. 354. "The amendment of 1901 strikes out the provision that stockholders shall, jointly and severally, be personally liable to creditors, to an amount equal to the amount of stock held by them, for every debt of the corporation, until the whole amount of the capital stock issued and outstanding at the time the debt was incurred shall have been fully paid. For this double liability, until all other stockholders shall have paid up, the amendment provides that the holder of capital stock 'not fully paid' shall be personally liable to an amount 'equal to the amount unpaid on the stock' held by him for debts of the corporation contracted, while such stock was held by him. See Laws, 1901, chap. 354, which saves rights pending when the amendment of 1901 took effect." 1 Cumming & Gilbert's Genl. Laws of N. Y., p. 884; 5 Birdseye's Cumming & Gilbert's Consol. Laws of N. Y. Annot., p. 5773, Laws, 1909, chap. 61, § 56.

⁹⁶ *Flour City National Bank v. Shire*, 84 N. Y. Supp. 410, 88 App. Div. 401, aff'd 179 N. Y. 587.

⁹⁷ Chap. 40, Laws, 1848, repealed by Laws, 1909, Genl. Corp. L. § 330.

it seems, issue its stock, as full-paid at anything less than its par value, in payment for property purchased; and a distinction existed in this respect between manufacturing and railroad corporations. It seems, however, that a manufacturing corporation had power to issue its bonds at less than par, either for money or in payment for property, and the repeal of the statute of usury, so far as it regarded corporations, operated to give validity to corporate bonds negotiated at less than par.⁹⁸

A contract, however, by a railroad to pay a contractor in bonds and full-paid nonassessable stock of the corporation for his work, labor and materials in constructing and equipping

⁹⁸ *Gamble v. Queen's County Water Co.*, 123 N. Y. 91, 33 N. Y. St. Rep. 88, 25 Abb. N. C. 410, 25 N. E. 201, 8 R. & Corp. L. J. 484, 9 L. R. A. 527, 31 Am. & Eng. Corp. Cas. 313, rev'g 5 N. Y. Supp. 124, 23 N. Y. St. Rep. 409, 52 Hun, 186, distinguishing on the first point *Van Cott v. Van Brunt*, 82 N. Y. 535, and on the second point, *Duncomb v. New York, Housatonic & Northern Rd. Co.*, 84 N. Y. 190. See second next following paragraph in this note.

Consideration for issue of stock and bonds. N. Y. Stat. Laws, 1909, chap. 61, § 55 (Birdseye's Cumming & Gilbert's Consol. Laws of N. Y. Annot., p. 5771), provides as follows: "No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as issued for property purchased."

The annotators append the following note: "Source—Former Stock Corp. L. (Laws, 1890, chap. 564), § 42, as amended by Laws, 1892, chap. 688, and Laws, 1901, chap. 354. The amendment of 1901 struck out the words 'No stock shall be issued for less than its par value. No such bonds shall be issued for less than the fair market value thereof.' The last sentence added. The amendment authorizes the issue of stock as full paid at less than its par value for property, and thus supersedes *Gamble v. Queen's County Waterworks Co.*, 123 N. Y. 91 (1890), and other cases to the contrary."

the road is not a stock subscription by the contractor, which makes him liable for the par value of the stock. Such contract is not a purchase of the stock and bonds to be paid for in work and property, but is a contract to accept full-paid stock and bonds as payment for the building of the road. The receiver appointed on the insolvency of such railroad is not entitled to recover from such contractor the alleged value of the stocks and bonds received as compensation for the construction of the road, when it is not alleged that the cost of constructing the road and the value of the properties acquired from the contractor were of less value than the par value of the stock and bonds delivered in payment. In any event, although the payment of the contractor in bonds and stocks were fraudulent, the receiver not being vested with rights personal to the creditors and merely standing in the place of the corporation, can maintain no action against the contractor to recover the alleged value of the stock and bonds, being, like the corporation, bound by an equitable estoppel.⁹⁰

§ 294. Stock Issued for Property—Valuation Should Be Fair and Just—Necessity of Good Faith in Transaction.

If stock is issued for property the value thereof should be a fair and just equivalent for the value of the stock.¹ And where corporate stock is to be paid for in property the agreement therefor should, in order to be valid as against creditors, be of such a character as to evidence an intent on the part of the stockholder to justly and fairly pay for his stock in that manner and not to thereby avoid just payment.²

The law presumes, however, when it is shown that the stock in a corporation has been paid for in full by the conveyance of property, and there is no evidence of value of the property, that the consideration was adequate.³ While, in the absence

⁹⁰ *Bostwick v. Young*, 103 N. Y. Supp. 607, 118 App. Div. 490, *aff'd* in (mem.) 194 N. Y. 516, 87 N. E. 1115.

¹ *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593.

² *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737.

³ *Lea v. Iron Belt Mercantile Co.* 119 Ala. 271, 24 So. 28.

of some constitutional or statutory provision prohibiting such action, paid-up shares of stock may be issued by a corporation for the purchase of property, still it is essential that the corporation should act in good faith and that the purchase should be based upon a fair valuation of the property; there should not be such a material or gross overvaluation between the contracting parties as to constitute a fraud upon subsequent creditors, for in such a case the latter can recover, from the persons holding such shares, the difference between the par value of the stock and actual value of the property so purchased.⁴ So where the charter of a corporation authorizes capital stock to be paid for in property, and the shareholders honestly and in good faith pay for their subscriptions to shares in property instead of money, third parties have no ground of complaint.⁵ And a stockholder in an insolvent corporation, who has paid his stock subscription in full by a transfer of a tract of land, in good faith, at an agreed value, for the use of the company's business, is not liable in equity to a creditor of the corporation who had knowledge of and assented to the transaction at the time when it took place, solely upon the ground that the land turned out to be of less value than was agreed upon.⁶

§ 295. Stock Issued for Property—Material Overvaluation—Stockholders Not Necessarily Liable to Creditors Therefor—Good Faith.

Stockholders of a corporation are not necessarily liable to creditors for the difference between the nominal value of their stock and the real value of property transferred to the corporation even though there was a material overvaluation; and such liability does not exist where a firm was organized into a corporation and the shareholders received their stock as

⁴ *Hastings Malting Co. v. Iron Range Brew. Co.*, 65 Minn. 28, 47 N. W. 652. See *Wishard v. Hansen*, 99 Iowa, 307, 68 N. W. 691, 61 Am. St. Rep. 138, 5 Am. & Eng. Corp. Cas. (N. S.) 437.

⁵ *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. 231.

⁶ *Fort Madison Bank v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. ed. 764.

"full paid" for their interest in the firm and the overvaluation of the assets was made without any intent to so overvalue and was adopted in good faith.⁷ So where no claim is made that the transaction is fraudulent the fact that stock was received in payment of lands transferred to the corporation at a price which greatly exceeded their real value is immaterial in a suit by one who has paid debts of an insolvent corporation in an amount greater than his share thereof.⁸ So under a Louisiana decision it is not sufficient to hold shareholders liable as for unpaid subscriptions that the property purchased with stock at its par value is overvalued, but the transaction must first be impeached as fraudulent against the corporation.⁹

§ 296. Stock Issued for Property—Shareholder May Be Liable Where Overvaluation Shows Fraud Upon Creditors Though None Intended.

Where, pursuant to an agreement among themselves, partners capitalize the partnership property at a valuation greatly in excess of its true value; create a corporation under the laws of the State to continue the former partnership business, fixing its capital stock at a sum equal to the inflated value placed on the partnership property; elect themselves managing officers of the concern; transfer this property, at such inflated value, to the corporation in exchange for its entire capital stock which they cause to be issued, as fully paid up, to each partner, or as he directed, in proportion to his interest in the partnership; and the corporation, continuing the business, afterwards becomes insolvent, the transaction will be regarded as a fraud upon the corporate creditors, although none was intended or contemplated by the parties to such transaction. In such case, each partner will be regarded as an original subscriber for so much of the stock as was thus issued to him and

⁷ *Taylor v. Cummings* (U. S. C. C. A.), 127 Fed. 108. Compare, however, *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644, under Mo. Const., art. 12, § 8, and Rev. Stat., 1899, § 962.

⁸ *Merrill v. Prescott*, 67 Kan. 767, 74 Pac. 250.

⁹ *Merchants' & Mechanics' Savings Bank v. Belington Coal & Coke Co.*, 51 W. Va. 60, 41 S. E. 390.

§ 297 PARTIES CONTINUED—CREDITORS—STOCKHOLDERS—

credited on his subscription for the actual value only of his interest in the partnership property transferred to the corporation in payment of such subscription. The balance left, after applying this credit, will be deemed a debt due from him to the corporation, and therefore corporate assets.¹⁰

§ 297. Stock Issued for Property—Valueless Property—Material Overvaluation.

Although a statute permits stock to be paid for in property still it should not be worthless or valueless, and where stockholders have paid for their stock by the transfer of property of such character they will still be liable as for unpaid subscriptions, upon an insolvent corporation's debt.¹¹ If an excessive valuation is placed on property given in payment for stock, the shareholders receiving such stock will be held liable to creditors to the extent of the difference between the face value of the stock and the real value of the property.¹² Where a State Constitution and statute so provide, if a subscription for stock in a corporation is made payable in property, the property must be taken at its reasonable money value; and though a margin will be allowed for an honest difference of opinion as to its value, a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholders individually as for an unpaid subscription.¹³ A person who actively participated in securing the organization of a corporation with a view of making a sale of property to it, and who in fact accepted benefits in his dealings with it, with full knowledge that the stock subscribed was to be paid for by a conveyance of the property at a grossly excessive valuation, may be estopped from disputing the validity of the transaction,

¹⁰ *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 38 Ohio L. J. 275, 63 Am. St. Rep. 705, 48 N. E. 285.

¹¹ *Salt Lake Hardware Co. v. Tintic Mill Co.*, 13 Utah, 423, 45 Pac. 200.

¹² *Stout v. Hubbell*, 104 Iowa, 499, 73 N. W. 1060.

¹³ *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 9 So. 129, 12 L. R. A. 307, 9 Ry. & Corp. L. J. 488.

or proceeding against the stockholders individually; but the principle cannot be extended to a vendor, who, having agreed to sell a tract of land to a corporation then being organized, executed a bond to one of the projectors as trustee for it, reciting therein that he had paid five thousand dollars, about one-tenth of the purchase money, that he was to transfer it to the corporation when fully organized, that the corporation should then execute its notes for the balance of the purchase money, and conditioned that a conveyance should be executed to it on payment of the notes; and who, having obtained judgment against the corporation on the unpaid notes, seeks to enforce an individual liability against the stockholders, as for an unpaid subscription, because the entire capital stock of the corporation, two hundred thousand dollars, was taken as satisfied by their conveyance of the land for which only five thousand dollars had been paid.¹⁴

A purchaser of stock in a corporation, organized under the Stock Corporation Law of New York, and the amendments thereto,¹⁵ before a certificate that the stock has not been fully paid is made and recorded, and when the stock has not been fully paid for because of overvaluation of property which had been taken in payment therefor, is liable to creditors of the company for an amount equal to the amount of his stock, although he bought the stock without knowing of the overvaluation.¹⁶ Again, a gross and obvious overvaluation of property conveyed to a corporation in consideration of an issue of stock at the valuation, is strong evidence of fraud in an action against a stockholder by a creditor to enforce personal liability for his debt.¹⁷

So the averment that incorporators conveyed to the corpo-

¹⁴ *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 12 L. R. A. 307, 9 So. 129, 9 Ry. & Corp. L. J. 488.

¹⁵ *Laws*, 1848, chap. 40, *Laws*, 1890, chap. 564, § 42, *Laws*, 1909, chap. 61, § 55.

¹⁶ *White, Corbin & Co. v. Jones*, 167 N. Y. 158, 60 N. E. 422, rev'g 45 App. Div. 241, 61 N. Y. Supp. 21.

¹⁷ *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 30 L. ed. 420, 7 Sup. Ct. 231.

ration, in full payment of one million, two hundred and fifty thousand dollars of stock, real estate for which they had just paid ninety thousand dollars shows the absence of a *bona fide* exercise of judgment and discretion in making the valuation, and intentional noncompliance with the requirement that the property shall be taken at its money value, and is a sufficient averment of fraud.¹⁸ The valuation placed by stockholders upon property given for stock does not bind the court so as to relieve the stockholders from their liability for unpaid subscriptions.¹⁹

The record of incorporation showing that stock subscriptions were paid by the conveyance of property does not operate as constructive notice to subsequent creditors of the corporation of the real value of the property received in payment of the subscriptions, or that it was grossly overvalued; the creditor is justified in presuming from the record, that the law requiring subscription for stock to be paid in money or in property at its reasonable value had been strictly complied with.²⁰

§ 298. Stock Issued for Property Which Subsequently Becomes Valueless or Consideration Fails.

A liability for corporate debts, upon the ground that the stock is not fully paid up, is not created against the officers and stockholders of a corporation by the fact that its stock has been issued for property and such property has become worthless.²¹ So where a petition by the receiver of an insolvent corporation showed that certain shares of stock of the corporation had been issued by it in payment for property conveyed to it, which conveyance was thereafter judicially void, so that the consideration for the shares of stock issued in payment wholly failed, and that the shares had been transferred to various persons, it was within the court's discretion to grant leave to

¹⁸ *Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271, 24 So. 28.

¹⁹ *Dunlap v. Ranch*, 24 Wash. 620, 64 Pac. 807.

²⁰ *Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271, 24 So. 28.

²¹ *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.

file a bill in behalf of the parties interested to determine the rights of such stockholders.²²

§ 299. Judgment Creditors—Stockholders' Liability to, for Unpaid Stock—Parties.

Stockholders of record are liable for unpaid installments, although in fact they may have parted with their stock, or may have held it for others; and in the absence of fraud they are bound by a decree against their corporation. So a creditor may subject subscriptions to a satisfaction of his judgment by a bill in equity where his legal remedies against a corporation, which has not made an assessment, are exhausted; and where subscriptions to stock are payable as called for, stockholders cannot object when an assessment to pay debts is made, that the corporate duty in this regard had not been earlier discharged.²³ A judgment creditor cannot proceed by a bill for himself alone to require stockholders to pay in their unpaid installments for stock as required by statute, but the proceeding must be by a bill in behalf of all the other creditors of the company as well as of himself.²⁴

§ 300. Amount of Creditors' Recovery on Stock May Be Limited by His Knowledge of Agreement Under Which Shares Issued.

A creditor is bound by his knowledge of the amount, though less than the par value, upon the payment of which shares were to be considered as paid up, and he is, therefore, limited in his recovery against stockholders upon their subscription liability to the sum so agreed upon.²⁵

²² *McMaster v. Drew*, 70 N. J. Eq. 6, 62 Atl. 559. "It does not admit of doubt but that such a bill could have been filed by the corporation but for the fact that it had become insolvent. By reason of its insolvency, no proceeding involving this matter could be taken by anyone except the receiver, and by him only by leave of court." *Id.* 7, per Magie, Chancellor.

²³ *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. 739.

As to unpaid subscriptions see also *Hambleton v. Glenn*, 85 Va. 991, 13 Va. L. J. 242, 9 S. E. 129.

²⁴ *Bickley v. Schlag*, 46 N. J. Eq. 533, 8 Ry. & Corp. L. J. 290, 20 Atl. 250, 31 Am. & Eng. Corp. Cas. 523.

²⁵ *Miller v. Higginbotham*, 29 Ky. L. Rep. 547, 93 S. W. 655.

· § 301. **Creditor or Stockholder May Sue After Demand Upon and Refusal of Corporate Authorities to Act—Stockholder May Defend.**

Although the corporation itself should bring a suit at law against its officers or directors for neglect and mismanagement whereby loss is sustained by the corporation, nevertheless an action may be maintained in a court of equity by creditors or shareholders in case the corporation wrongfully refuses or is disabled to bring suit, provided proper demand so to do is made.²⁶ And where proper demand is made upon the corporate authorities to protect rights of or to redress wrongs against the corporation and they fail to act, a stockholder may file a bill on behalf of the corporation.²⁷

So a stockholder in a corporation may sue both at law and in equity in his own name in behalf of its interest and to vindicate a wrong done to it, when the latter cannot or will not do so in its corporate capacity; and under like circumstances a stockholder may defend in his own name an action brought against a corporation.²⁸ A stockholder may also sue in equity

²⁶ *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 9 Ry. & Corp. L. J. 482, 13 Am. & Eng. Corp. Cas. 253, 4 Bkg. L. J. 249.

See also the following cases:

Maine: *Wells v. Dane*, 101 Me. 67, 63 Atl. 324 (may sue when proper officers unable or unwilling).

Michigan: *Starr v. Shepard*, 145 Mich. 302, 108 N. W. 709, 13 Detroit Leg. N. 528 (may sue after request and neglect of authorities to act).

Missouri: *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951 (may sue after request and failure to act).

Nebraska: *State v. Holmes*, 60 Neb. 39, 82 N. W. 109 (may sue; neglect and refusal to protect property).

New Jersey: *Groel v. United Electric Co.*, 70 N. J. Eq. 616, 61 Atl. 1061 (may sue; after neglect or refusal).

South Dakota: *Whitney v. Hazard*, 18 S. Dak. 490, 101 N. W. 346 (may sue; after neglect or refusal).

Tennessee: *Knapp v. Golden Cross Soc.*, 121 Tenn. 212, 118 S. W. 390 (may sue; after demand and refusal).

Texas: *People's Inv. Co. v. Crawford* (Tex. Civ. App., 1898), 45 S. W. 738 (may sue after refusal).

²⁷ *Foster v. Mansfield, Coldwater & Lake Michigan R. Co.* (U. S. C. C.), 36 Fed. 627, case aff'd in 146 U. S. 88, 36 L. ed. 899, 13 Sup. Ct. 28.

²⁸ *Morrill v. Little Falls Manufacturing Co.*, 46 Minn. 260, 48 N. W. 1124, 10 Ry. & Corp. L. J. 133. The rules by which a stockholder's right to defend

for himself, the corporation, and other stockholders where the proper corporate authorities are unwilling or unable to proceed with the measures necessary to protect the interests and property of the corporation.²⁹

Again, in case of a wrong to a corporation, remediable only by judicial interference, and the persons possessing the primary right or its officers to move in that regard fail upon demand being made by a stockholder to do so, or without such demand in case the circumstances are such as to indicate that the same would be useless, any stockholder may sue on behalf of all the stockholders to protect the corporate rights, making the wrongdoer and the corporation parties defendant. But whether or not a case falls within the principle stated must be determined by its own peculiar facts. The trial court has considerable discretion in the matter; and its determination that a suit is proper, within the principles justifying its equitable jurisdiction, will not be reversed on appeal unless it clearly appears to be erroneous. Thus, in a stockholder's action against the corporation and its president to vindicate the corporation's right to real estate, the complaint alleged that there had been no meeting of the stockholders or of the directors for many years; that the directors had not for a long time paid any attention to the corporate affairs; that they left the president in full control; that the secretary, a large stockholder, had full knowledge of the president's misdeeds,

in behalf of a corporation considered and applied in an action brought by a plaintiff against a corporation of which he claims to be a president, and has caused the summons upon it to be served upon himself as such president and upon another person as its secretary, and where, after the corporation is in default for want of answer, stockholders, also made defendants in such action, but not served with the summons until long after the corporation has defaulted, make application to defend in its behalf, their proposed answer disclosing a meritorious defense on the part of the corporation, and also alleging that the plaintiff is not the president, and that the person whom he has recognized as secretary is not the secretary of the corporation. In the consideration of such an application, and as against the plaintiff at least, the court must treat the corporation as having been duly served with the summons, and as in default for want of answer, through the inexcusable neglect of its officers.

²⁹ *Wells v. Dane*, 101 Me. 67, 63 Atl. 324.

acquiesced therein, and was so hostile to stockholders like plaintiff that he suppressed information of the names of other officers of the corporation; that the president suffered and procured real estate of the corporation to be sold for taxes, and by mesne conveyances acquired the tax titles for himself; that a request on the corporation to bring an action to redress the wrong would warn the president and stimulate him to pass the wrongfully acquired titles to innocent parties; that a request was made on the secretary to have an action brought in the name of the corporation, which was refused. It was held that the trial court, in overruling a demurrer to the complaint, had reasonable grounds to conclude that efficient demand on the corporation to bring an action was impracticable, if not impossible.³⁰ A communication to the president of a corporation presenting the matters complained of and requesting action by the directors has been held sufficient to enable stockholders to sue in their own names to obtain the relief so demanded and refused.³¹

A request to the managing officers of a corporation to institute an action to set aside and cancel a fraudulent issue of corporate stock, and their refusal, is all that is necessary to enable an individual stockholder to maintain the suit. It is not necessary that he go further, and request other stockholders to commence the action.³² One or more stockholders may sue in equity, in behalf of himself or themselves and other stockholders to have a merger and union of two corporations declared *ultra vires* and void and to enjoin such unlawful acts; and such suit may be maintained against the corporation and those participating in the alleged wrongful acts, where demand has first been made upon the corporate authorities to institute the suit and they have refused. The court, per Shields, J., said: "It is well settled that courts of equity have jurisdiction to define and determine the extent and limitations of the powers of corporations, and to declare contracts, or other

³⁰ Donnelly v. Sampson, 135 Wis. 368, 115 N. W. 1089. .

³¹ Ball v. Rutland Rd. Co. (U. S. C. C.), 93 Fed. 513.

³² Shaw v. Staight, 107 Minn. 152, 20 L. R. A. 1077, 119 N. W. 951.

corporate action, made or threatened by the corporation or its officers, in excess and violation of those powers, invalid, and to restrain and prohibit the performance of them. The right of stockholders in proper cases to maintain suits for these purposes is also well settled.³³ If corporation directors are chargeable with misconduct in their office and the corporation is disabled to sue at law or it neglects through fraud or collusion to seek redress, an individual stockholder may maintain a suit in equity against such directors where they have been requested to permit suit to be brought by the stockholder in the corporate name and they have refused to do so.³⁴

§ 302. When Demand Upon Corporate Authorities and Their Refusal a Condition Precedent to Suit.

Where the cause of action belongs to the corporate entity it is only where the corporation, either actually or virtually, refuses to institute or defend an action that one or all the stockholders can appear in its behalf.³⁵ In order to enable creditors or shareholders of a corporation, which is not disabled from suing but is a going concern, to sue in equity, a demand should be made upon the directors in office and not on the president alone; and where, after a demand upon the president to bring suit, no request has been preferred to the di-

³³ *Knapp v. Golden Cross*, 121 Tenn. 212, 118 S. W. 390.

³⁴ *Allen v. Curtis*, 26 Conn. 456.

³⁵ *Miller v. Murphy*, 17 Colo. 408, 30 Pac. 46.

That demand and refusal conditions precedent unless demand useless, see the following cases:

Alabama: *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401.

Georgia: *Cornell v. Sims*, 111 Ga. 828, 36 S. E. 627.

Illinois: *Perry County v. Stebbins*, 66 Ill. App. 427.

Indiana: *Wright v. Floyd* (Ind. App., 1909), 86 N. E. 971; *Supreme Sitting of Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. W. 1128, 20 L. R. A. 210.

Iowa: *Troutman v. Council Bluffs St. Fair & Carnival Co.* (Iowa, 1909), 120 N. W. 730.

Massachusetts: *Dumphy v. Traveler Newspaper Assoc.*, 146 Mass. 495, 16 N. E. 426.

Pennsylvania: *Wolf v. Pennsylvania Rd. Co.*, 195 Pa. St. 91, 45 Atl. 436.

Virginia: *Virginia Passenger & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198.

West Virginia: *Ward v. Hotel Randolph Co.* (W. Va., 1909), 63 S. E. 613.

rectors, and they have never declined to sue, the failure to prefer such request would ordinarily be fatal.³⁶

Stockholders must first apply to the corporate authorities before a court of equity will entertain a bill by them to remedy corporate wrongs committed by officers of the corporation.³⁷ A stockholder or a majority of the stockholders cannot come into equity to restrain the action of the directors whether *de jure* or *de facto* in a matter not *ultra vires* unless the corporation itself refuses to act, or is incapable of seeking adequate redress.³⁸ A stockholder in a private corporation, or a minority of the stockholders, cannot maintain a bill in equity to prevent illegal action on the part of the majority, without a previous request to the proper officers to interfere, and their failure or refusal to do so; unless facts are stated which show that such request would be unavailing and useless.³⁹

A stockholder's action to set aside a contract made by his corporation upon the ground that it was unconscionable does not lie where he made no demand that the corporation bring the action and the corporation, made defendant, also alleges the invalidity of the contract. And a failure to make a demand that the corporation sue is not excused by alleging that the majority of the directors who authorized the contract are still in office, if there be no charge that they were guilty of wrongdoing.⁴⁰ Again, where it does not appear that any demand was made upon the directors to defend a mortgage foreclosure suit against the corporation or that there was any refusal to defend it, minority stockholders owning only a small amount of the stock cannot maintain a suit in equity to restrain the foreclosure where, as the basis for the injunction

³⁶ Wallace v. Lincoln Savings Bank, 89 Tenn. 630, 15 S. W. 448, 9 Ry. & Corp. L. J. 482, 13 Am. & Eng. Corp. Cas. 253, 4 Bkg. L. J. 249.

³⁷ Boyd v. Sims, 87 Tex. 771, 11 S. W. 948; Rathbone v. Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. 570; Taylor v. Holmes, 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. 1192.

³⁸ Moses v. Tompkins, 84 Ala. 613, 4 So. 763.

³⁹ Mack v. De Bardeleben Coal & Iron Co., 90 Ala. 396, 8 So. 150, 9 L. R. R. 650, 8 Ry. & Corp. L. J. 394, 31 Am. & Eng. Corp. Cas. 389.

⁴⁰ McCoy v. Gas Engine & Power Co., 135 App. Div. (N. Y.) 771.

bill, there is only a claim of collusion between the complainants in the foreclosure suit and the officials.⁴¹

A stockholder in a building and loan association complaining of undue advantage given by the association to holders of paid-up stock, cannot maintain a bill in equity against the corporation to redress the alleged corporate wrongs, until he has done all things in his power to obtain, within the corporation, redress for the wrongs complained of; and a bill filed for such purpose which fails to allege an effort on the complainant's part to have the wrongs redressed within the corporation, or else which shows a satisfactory reason for its failure to do so, cannot be maintained and is subject to demurrer.⁴²

§ 303. When Demand Upon and Refusal of Corporate Authorities Not a Condition Precedent to Suit.

A demand may be dispensed with in the State Courts under certain circumstances, as where the corporate management is under control of the guilty parties.⁴³ So it is not necessary to make a demand upon either the corporation or its directors in order to enable a stockholder to sue to restrain its directors from misappropriating the moneys of the corporation where the persons chargeable with the wrongful acts are those upon whom the demand must be made.⁴⁴ And when directors or officers of a corporation are charged with mismanagement of the corporate property a stockholder may be permitted to sue in his own name when it is apparent that an application for redress through corporate action would be useless.⁴⁵ So

⁴¹ *Alexander v. Searey*, 81 Ga. 536, 8 S. E. 630.

⁴² *Johnson v. National Building & Loan Assoc.*, 125 Ala. 465, 28 So. 2.

⁴³ *Miller v. Murphy*, 17 Colo. 408, 30 Pac. 46. See also *Sigwald v. City Bank*, 82 S. C. 382, 385, 64 S. E. 398.

Demand unnecessary when corporation cannot sue. *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048.

Demand unnecessary when there is no proper authority upon whom to make demand and it would be unavailing. *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207.

Refusal, when insufficient, see *Hendrickson v. Bradley* (U. S. C. C. A.), 85 Fed. 508, 29 C. C. A. 303.

⁴⁴ *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

⁴⁵ *Sigwald v. City Bank*, 82 S. C. 382, 385, 64 S. E. 398.

where a corporation is exclusively under the control of its directors and officers whose acts and management are questioned, and a demand by a stockholder that the corporation bring an action against the officers would be idle and fruitless, equity permits the stockholder to bring the action in his own name.⁴⁶ A stockholder may also sue in equity in his own name to enforce a right of the corporation, without first requesting the directors to sue, when it is made to appear that if such request had been made it would have been refused, or, if granted, that the litigation following would necessarily be subject to the control of persons opposed to its success. Thus, where directors of a corporation are themselves the wrongdoers, or the partisans of the wrongdoer, they are incapacitated from acting as the representatives of the corporation in any litigation which may be instituted for the correction of the wrong which it is alleged they have committed or approved.⁴⁷ And it would evidently be useless for a stockholder to apply for redress through corporate action where the corporation is in the hands of a receiver and no application could successfully be made at a meeting of the stockholders or before the board of directors charged with mismanagement, where the receiver is one of the parties charged with the wrongdoing, as in such case he would not and could not sue himself.⁴⁸ Again, a de-

⁴⁶ *Lawrence v. Weber*, 65 Misc. (N. Y.) 603.

⁴⁷ *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118, 36 Am. & Eng. Corp. Cas. 315.

⁴⁸ *Sigwald v. City Bank*, 82 S. C. 382, 385, 64 S. E. 398. The court, per Jones, J., said: "The case is much like *Brinckenhoff v. Bostwick*, 88 N. Y. 52, wherein demurrer was overruled. Appellants contend, plaintiff's only remedy was to have the receiver removed and a new one appointed who could be directed by the court to conduct the litigation. But the present suit is before the court which appointed the receiver and the court may not care, at this juncture, to remove the receiver, as no charges are made against him as such, and may consider that the ends of justice would as well be met by permitting the present action to continue with the receiver as a party defendant.

"Judge Gage was of the opinion that such leave to maintain the action should now be given to plaintiff, and we see no want of power or impropriety in such determination, if the absence of previous leave is a mere irregularity and not jurisdictional.

"It will be observed that the suit is practically against the directors and

mand and refusal upon the corporate authorities is unnecessary to enable a stockholder to maintain an action in equity for relief where a contract is wrongfully taken by the corporation's president in his own name instead of in the company's name and said stockholder, who was a director and owned one-half the stock, had no notice of the meeting at which it was alleged the board of directors approved such action and was not consulted in the matter of approving the same.⁴⁹ So a stockholder may sue to restrain the unlawful transfer of corporate stock by the directors to a consolidated corporation; nor is it necessary to consult the directors in such case.⁵⁰

§ 304. Effect of Demand and Refusal Dependent Upon Circumstances—Discretion of Directors—Simulated Demand.

It is plain that the question of the right of a stockholder to obtain redress and the necessity of a demand upon and refusal of the corporate authorities as a condition precedent must rest upon and be decided with reference to the facts in each particular case.⁵¹ And it does not follow that the mere refusal of a corporation to sue will authorize a stockholder who is dissatisfied therewith to bring suit, as a very wide discretion is reposed in the directors, and it is not the duty of managers of such corporations to bring suit upon every request based upon alleged wrong or injury; and if the refusal be in good faith the courts will rarely entertain a shareholder's suit for the same cause of action and so override the refusal. To justify the suit the refusal must have been wrongful;⁵² an honest

is not to enforce any liability of the receiver as such. It is not intended to recover or affect assets in the control of the court, but to augment the assets for distribution. Such consideration might well have moved the court to hold that leave to bring the action was unnecessary, if the stockholders' right to sue was complete on the other ground mentioned."

⁴⁹ *Davis v. Gemmel*, 70 Md. 356, 17 Atl. 259, 5 Rd. & Corp. L. J. 447.

⁵⁰ *Butts v. Simpsonville & B. C. Turnp. Co.*, 10 Ky. L. Rep. 669, 10 S. W. 134, 2 L. R. A. 594.

⁵¹ *Elliott v. Puget Sound Wood Products Co.*, 52 Wash. 637, 641, 101 Pac. 228.

⁵² *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 9 Ry. & Corp. L. J. 482, 13 Am. & Eng. Corp. Cas. 253, 4 Bkg. L. J. 249.

and fair refusal precludes suit.⁵³ So where the request on the directors to sue in the corporation's name is simulated and does not express the actual nature of the action intended to be brought the stockholders will be denied the relief sought, such as the appointment of a receiver, an accounting, the rescission of an assessment and an injunction to restrain the sale of stock to pay the assessment.⁵⁴ It is held that the question of litigation is not one for the managers to determine and that the knowledge or consent of the directors is necessary, otherwise the suit will be dismissed when relief in equity is sought by the secretary of a corporation in its behalf.⁵⁵

§ 305. Demand Upon and Refusal of Corporate Authorities—Necessity of Alleging and Showing Same.

A stockholder in a corporation which has passed the term of its corporate existence, and has long ceased to exercise its corporate franchises, who desires to obtain equitable relief for it, must in order to maintain an action therefor in his own name, show that he has endeavored in vain to secure action on the part of the directors, if there be any, or to have the stockholders elect a new board of directors, and must disclose when he acquired his interest in the corporation.⁵⁶ And where a stockholder of a corporation in order to protect its rights and

⁵³ *Kessler v. Ensley Co.* (U. S. C. C.), 123 Fed. 546.

⁵⁴ *Bacon v. Irvine*, 70 Cal. 221, 11 Pac. 646.

⁵⁵ *Weir Furnace Co. v. Aushutz-Bradberry Co.*, 10 Pa. Dist. Rep. 81, 31 Pitts. Leg. J. (N. S.) 200.

⁵⁶ *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179.

See also the following cases:

United States: *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827 (must appear that complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation and that the ownership of the stock was vested in him at the time of the transactions of which he complains or was thereafter transferred to him by operation of law); *Savings & Trust Co. of Cleveland v. Bear Valley Irrig. Co.* (U. S. C. C.), 112 Fed. 693.

Colorado: *Miller v. Murphy*, 17 Colo. 408, 30 Pac. 46 (or that stockholder cannot obtain redress either through the managing body, or the stockholders, or that effort to do so would be unavailing); *Smith v. Bulkley*, 18 Colo. App. 227, 70 Pac. 958 (must show collusion or refusal).

property against the threatened action of a third party, filed his bill against the latter and the corporation, alleging, *inter alia*, that the directors, although thereunto requested, had neglected and refused to institute proceedings, it was held, that he must show a clear case of such absolute and unjustifiable neglect and refusal of the directors to act as would lead to his irreparable injury should he not be permitted to bring suit.⁵⁷ So it must be shown by a stockholder, who, in his own behalf, seeks an accounting and equitable relief generally, that he has earnestly endeavored to induce the managers, or the body of stockholders to take some remedial action; and the details of his efforts must also be shown.⁵⁸

In Alabama where a bill is filed by a stockholder of a corporation, to have redressed alleged corporate wrongs, without having made a request of the managing body of the defendant corporation to have corrected the grievances complained of, the complainant must aver in his bill the facts constituting his excuse for not making such request with particularity and definiteness; the averment of conclusions will not suffice, but the facts upon which these conclusions are based must be averred. And before a stockholder can maintain a suit in his own name against a corporation of which he is a member, to redress alleged corporate wrongs, he must show to the satisfaction of the court that he has done all in his power to obtain, within the corporation itself, the redress of the wrongs complained of; that he has made an honest effort to get the governing body of the corporation to remedy the wrong, and,

Connecticut: Allen v. Curtis, 26 Conn. 456 (or that request has been made and refused).

Indiana: Wright v. Floyd (Ind. App., 1909), 86 N. E. 971.

Kansas: Home Min. Co. v. McKibben, 60 Kan. 387, 56 Pac. 756 (must show wrongful or fraudulent neglect of interests).

Kentucky: Pittsburg, C. C. & St. L. Ry. Co. v. Dodd, 115 Ky. 176, 24 Ky. L. Rep. 2057, 72 S. W. 822 (what showing of facts as to request and refusal sufficient).

Missouri: Loomis v. Missouri Pac. Ry. Co., 165 Mo. 469, 65 S. W. 962 (what is not a sufficient showing).

⁵⁷ Detroit v. Dean, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. 482, 560.

⁵⁸ Robinson v. West Virginia Loan Co. (U. S. C. C.), 90 Fed. 770.

failing with them, he then applied to the stockholders as a body to take action towards redressing the grievances complained of.⁵⁹ So under another decision in the same State a bill filed against a corporation must show that application was first made to the board of directors or to the stockholders to redress the wrongs complained or for authority to prosecute the suit, or facts showing that it could not be done, or that it was not reasonable to require it, or that it would be unavailing.⁶⁰ If a bill in equity by a stockholder against the corporation shows that a majority of the directors are also stockholders and directors of a rival corporation, which has bought up a majority of the stock of the defendant corporation, and are using their voting power in the interest of said rival corporation, to the detriment of the other, this dispenses with the necessity of a previous request for action by the directors; but if it shows that, of seven directors, only three have been elected by the voting power of the rival corporation, an averment that one of the four old directors in fact has no interest in either corporation, but holds his stock and votes in the interest and at the direction of the president of the rival corporation, does not dispense with the necessity for such previous request.⁶¹

§ 306. **Same Subject.**

It is held in Georgia that as a general proposition, stockholders in a corporation cannot in their own names institute an action against it, nor defend one brought against it, until a request from them to the directors to institute or defend such action has been made and refused, which fact must be alleged in either instance. Such allegation, however, may be omitted when the corporate management is under the control of parties who, it is alleged, are guilty of fraud or collusive conduct in refusing to bring or to defend the suit which such stock-

⁵⁹ *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 21 So. 315, 59 Am. St. Rep. 140.

⁶⁰ *Roman v. Woolfolk*, 98 Ala. 219, 13 So. 212.

⁶¹ *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 8 So. 150, 9 L. R. A. 650, 8 Ry. & Corp. L. J. 394, 31 Am. & Eng. Corp. Cas. 389.

holders desire shall be instituted or defended. But in neither of these events can the stockholders institute or defend an action in the name of the corporation. On the contrary, the corporation must be a party defendant to the action, and sufficient allegations of the failure of the corporate authorities to take action be made, to authorize the stockholders to intervene in their own name.⁶²

It is also decided in Kentucky that it is well settled that an action to recover corporate property must be brought in the name of the corporation, and that such an action cannot be maintained by one or more stockholders unless it should be shown that the corporation or its directors declined to bring the action, and that the interests of the stockholders make it necessary that one should be instituted. When this state of case is presented, an action to recover corporate property or to protect the interests of the corporation, may be brought by the stockholders.⁶³

Under a New York decision an averment of a demand made upon a corporation to sue, and its refusal or unreasonable neglect so to do, is essential to enable the plaintiff stockholder to sue in his own name.⁶⁴ It is also decided in that State that a stockholder's action being derivative, the plaintiff must show either a demand and a refusal of the corporation to sue, or that a demand would be futile, in that those in control of the corporation are the wrongdoers so that an action by the corporation would not be prosecuted in good faith.⁶⁵

Under a Washington decision a court of equity will not entertain a bill by stockholders to set aside a contract made by officers of the corporation, alleged to be contrary to the in-

⁶² *Cornell v. Sims*, 111 Ga. 828, 36 S. E. 627.

⁶³ *Reinecke v. Bailey*, 33 Ky. L. Rep. 977, 112 S. W. 569, citing *Collier v. Deering Camp Ground Assoc.*, 23 Ky. Law Rep. 1799; P., C., C. & St. L. R. Co. v. *Dodd*, 24 Ky. Law Rep. 2057; *Jones v. Johnson*, 10 Bush, 649; 10 Cyc. pp. 963, 967.

⁶⁴ *Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493, 53 N. E. 520, aff'g 41 N. Y. Supp. 566, 9 App. Div. 269. As to what must be shown see *Rosenbaum v. Rice*, 83 N. Y. Supp. 494, 86 App. Div. 617.

⁶⁵ *McCoy v. Gas Engine & Power Co.*, 135 App. Div. (N. Y.) 771.

terests of the corporation and made without authority unless it is shown in the complaint that the stockholders have sought redress in the corporation or that it would be fruitless for them to do so.⁶⁶

§ 307. Enforcing Stockholders' Liability — Exhausting Remedies Against Corporation—When Judgment and Execution Unsatisfied Are Conditions Precedent.

Where the statutes of the State which creates a corporation, making the stockholders liable for the corporate debts, provide a special remedy, the liability of a stockholder can be enforced in no other manner in a court of the United States. And where the statutes of a State make the stockholders of a manufacturing corporation liable for its debts until its capital stock has been paid in and a certificate thereof recorded; and originally provided that the property of stockholders might be taken on writ of attachment or execution issued against the corporation, or the creditor might have his remedy against the stockholders by bill in equity; and since modified by enacting that all proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity or by action of debt on the judgment obtained against the corporation; a creditor of the State enacting such statute, cannot bring an action at law against the executor of a stockholder in

⁶⁶ *Elliott v. Puget Sound Wood Products Co.*, 52 Wash. 637, 101 Pac. 228. The court, per Dunbar, J., said (at p. 641) as to the general rule: "This may be a technical rule yet it is founded on general principles of justice and of necessity in the transaction of corporate business though the officers of the corporation, in the absence of fraud or oppression, must be allowed to transact their own business and settle their own difficulties; the duty of the stockholder being to bow to the will of the majority as expressed through their agents.

"It is said by the appellants in their brief that a corporation has no means of acting except through its agents, and that the acts complained of in this case are the acts of those agents; therefore a court of equity will interfere at the suit of a shareholder without any proof or allegation of a demand upon such agents, for a demand would ordinarily be nugatory under these circumstances. Of course, it is well answered that every grievance in a corporation may arise from the acts of its agents or directors, and that if the position of the appellants is tenable, the general rule would be destroyed."

the Circuit Court of the United States in another State, without having obtained a judgment against the corporation, even if the corporation has been adjudged bankrupt.⁶⁷ General creditors of a corporation must reduce their claims against it to judgment and so exhaust their remedies before they can maintain a suit against stockholders in a Federal court of equity.⁶⁸

It is decided in Georgia that even though a corporation has ceased to do business and has made a *pro rata* distribution of its property among its shareholders, still it is necessary that a claim be reduced to judgment in order to enable a creditor to hold stockholders liable.⁶⁹

In Kansas the return of an execution unsatisfied is held sufficient to enable suit to be brought against a stockholder.⁷⁰

Under the New York Stock Corporation Law⁷¹ no action can be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution, with costs, is the amount recoverable. These provisions as to judgment and execution, therefore, constitute conditions precedent to the maintenance of an action by a creditor.⁷² And the statute must be complied with; nor does

⁶⁷ *Fourth National Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. 757. See *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 37 L. ed. 577, 13 Sup. Ct. 691.

When judgment and execution unsatisfied condition precedent to suit, see *New Hampshire Sav. Bank v. Richey* (U. S. C. C. A.), 121 Fed. 956, 58 C. C. A. 294.

Action cannot be maintained where corporation itself estopped. *Kessler v. Ensley Co.* (U. S. C. C.), 123 Fed. 546.

⁶⁸ *New Hampshire Sav. Bank v. Richey* (U. S. C. C. A.), 121 Fed. 956, 58 C. C. A. 94.

⁶⁹ *Lamar v. Allison*, 101 Ga. 270, 28 S. E. 686.

⁷⁰ *Thompson v. Pfeifer*, 60 Kan. 409, 56 Pac. 763.

⁷¹ N. Y. Laws, 1890, chap. 564, § 55, as amended by Laws, 1892, chap. 688; Laws, 1909, chap. 61.

⁷² *National Bank of Auburn v. Dillingham*, 147 N. Y. 603, 611, 71 N. Y. St. Rep. 253, 42 N. E. 338; *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338. See *United States Glass Co. v. Levett*, 53 N. Y. Supp. 688, 24 Misc. 424.

the inability, because of the crowded condition of the calendar, to obtain a judgment in an action which has been commenced, or the insolvency of the corporation constitute any excuse for noncompliance.⁷³

An action against a stockholder in a limited liability company organized under the "Business Corporation Act" of New York⁷⁴ to recover a debt of the corporation under the provision of the act⁷⁵ making such a stockholder liable for the debts of the company to an amount equal to his stock until the whole amount of capital stock has been paid in and certificate filed, could be maintained after a suit had been commenced against the corporation but before judgment against it. The remedy of the creditor suing, after recovery of judgment against the stockholder, was simply suspended until after judgment and execution against the corporation and return thereof unsatisfied.⁷⁶

Under an Ohio decision the statutory liability of stockholders for corporate debts cannot, however, be enforced by a creditor until after levy and return of execution as unsatisfied, where the corporation continues its business and has property, even though insufficient to satisfy its debts in full, which may be made subject to levy and sale on execution.⁷⁷

§ 308. Enforcing Stockholders' Liability — Exhausting Remedies Against Corporation—When Judgment and Execution Unsatisfied Are Not Conditions Precedent.

The statutory liability of stockholders may be enforced by creditors or any of them without first proceeding against the corporation after it has become insolvent and assigned its prop-

⁷³ So held in *Gause v. Boldt*, 99 N. Y. Supp. 442, 49 Misc. 340, 100 N. Y. Supp. 1117. See *United Glass Co. v. Vary*, 152 N. Y. 121, 46 N. E. 312.

⁷⁴ Act 1875, chap. 611, *Laws of 1875, Business Corp. Laws, Laws, 1909*, chap. 12, § 6.

⁷⁵ Section 37.

⁷⁶ *Walton v. Coe*, 110 N. Y. 109, 16 N. Y. St. Rep. 866, 17 N. E. 676, 4 Rd. & Corp. L. J. 377.

⁷⁷ *Barrick v. Gifford*, 47 Ohio St. 180, 23 Ohio L. J. 313, 2 Am. R. & Corp. Rep. 690, 24 N. E. 259, 31 Am. & Eng. Corp. Cas. 484.

erty for the benefit of creditors.⁷⁸ If a corporation has been dissolved and cannot be sued a creditor can proceed to enforce the payment of unpaid subscriptions without first establishing his claim.⁷⁹ And a judgment and unsatisfied execution are not a prerequisite to a suit by a creditor against a stockholder for an unpaid subscription where the corporation has ceased to carry on business, is insolvent and in a receiver's hands.⁸⁰

Under a Kansas decision, a corporation which ceases to do business for more than one year is deemed to be dissolved, for the purpose of enabling creditors to enforce the individual liability of stockholders; but such cessation of business does not operate as a legal and complete dissolution of the corporation for any purpose other than the one named. And in that State a creditor of an insolvent corporation may enforce the individual liability of stockholders, under the general statutes of that State,⁸¹ when there is no property subject to be taken on execution, notwithstanding there may at the time be assets of the corporation in the hands of an assignee to be ultimately applied in payment of corporate debts.⁸²

So under a Washington decision, a judgment is not a prerequisite in the absence of a statute where the corporation is insolvent and has no assets, the suit by a creditor to enforce unpaid stock subscriptions being in the nature of a creditor's bill.⁸³

When the performance of a condition becomes impossible by the operation and effect of a statute, that is, becomes illegal, the performance is excused and the rights of the parties will be preserved. The courts will not require that useless and

⁷⁸ *Barrick v. Gifford*, 47 Ohio St. 180, 23 Ohio L. J. 313, 24 N. E. 259, 2 Am. R. & Corp. Rep. 690, 31 Am. & Eng. Corp. Cas. 484. See also *Salt Lake Hardware Co. v. Tintic Mills Co.*, 13 Utah, 423, 45 Pac. 200, 4 Am. & Eng. Corp. Cas. (N. S.) 224.

⁷⁹ *Lewiston v. Stoddard*, 78 Conn. 575, 63 Atl. 621.

⁸⁰ *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

⁸¹ Gen. Stat., 1897, chap. 66, § 50.

⁸² *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757, 9 Am. & Eng. Corp. Cas. (N. S.) 45.

⁸³ *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598.

unwarranted action be taken. Thus in an action brought under the Stock Corporation Law of New York,⁸⁴ to recover against stockholders for debts of a corporation to an amount equal to the amount unpaid on their stock, it appeared that the claim was proved against the corporation in bankruptcy proceedings and plaintiff received a dividend thereon. It was held that the stockholders are protected by lawful proceedings in a court of paramount jurisdiction in the premises as fully as they could have been by full compliance with the State law, and that the failure to obtain a judgment and return of execution unsatisfied, as required by the Stock Corporation Law,⁸⁵ was excused by the discharge of the corporation in bankruptcy. Again, any judgment resting on a debt covered by a discharge in bankruptcy must be canceled by the court in which it was rendered, upon application made pursuant to § 1268 of the Code of Civil Procedure.⁸⁶ And in that State an employé of a corporation having recovered judgment in a city court against the corporation for services rendered, need not file a transcript of the judgment with the county clerk and exhaust his remedy against the corporation by the execution of a court of record before suing stockholders.⁸⁷ It is sufficient if he exhaust his remedy against the personal property of the corporation by the execution of the city court.⁸⁸ An averment that a judgment has been recovered and an execution returned unsatisfied against a corporation is unnecessary in a suit by creditors to enforce stockholders' liability for corporate debts where insolvency, an assignment for creditors and financial inability to carry on the corporate business are alleged.⁸⁹

⁸⁴ Section 54, Laws, 1890, chap. 564, as amended by Laws, 1892, chap. 688; Laws, 1901, chap. 354. See Laws, 1909, chap. 61, § 56, Birdseye's Cumming & Gilbert's Consol. L. of N. Y. Annot., p. 5773.

⁸⁵ Section 55.

⁸⁶ Firestone Tire & Rubber Co. v. Agnew, 194 N. Y. 165, 86 N. E. 116, rev'g 112 N. Y. Supp. 907, 128 App. Div. 518.

⁸⁷ N. Y. Stock Corporation Law, §§ 57, 59, Laws, 1909, chap. 61, 5 Birdseye's Cumming & Gilbert's Consol. Laws N. Y. Annot. pp. 5775-6.

⁸⁸ Padros v. Swarzenbach, 134 App. Div. (N. Y.) 811.

⁸⁹ Morgan v. Lewis, 46 Ohio St. 1, 17 N. E. 558, 20 Ohio L. J. 423.

§ 309. Stockholders' Liability—Dissolution as Condition Precedent to Enforcing Same.

Where a statute provides that stockholders in a corporation are liable, upon a dissolution of the company, for the debts thereof to an amount equal to the amount of the par value of the stock held by them at the time of such dissolution, then the dissolution is a condition precedent that must appear before the creditor can enforce this statutory liability by suit against the shareholder. Such dissolution need not, however, be first established by legislative enactment or by judicial proceedings before the company's creditors can proceed directly against the stockholders to enforce their statutory liability for debts of the corporation. It is sufficient for the declaration to state that the corporation was dissolved on or about a date stated therein. Such a dissolution takes place, in the sense in which the term is used in the statute when the corporation has debts and no assets and has ceased to act and to exercise its corporate functions, or has suffered acts to be done which end the object for which it was created; and the facts and circumstances relied upon as constituting such dissolution are matters of evidence and need not be averred in the pleadings.⁹⁰

§ 310. Effect of Equity Rule 94—When Demand Upon Directors for Relief Is and Is Not Condition Precedent—Stockholders—Right to Protect Corporation When Directory Derelict.

In the Federal Courts a demand upon the managing board of the corporation is necessary under Rule 94 before a stockholder can maintain a suit.⁹¹

Equity Rule 94, which is intended to secure the Federal Courts from imposition upon their jurisdiction, recognizes the

⁹⁰ *Gibbs v. Davis*, 27 Fla. 531, 8 So. 633. The statute which provides an additional summary remedy to creditors is held in this case not to supersede the statutory remedy set forth in the text. The statute of 1887 changes the liability of stockholders in corporations so as to limit such liability to the amount that remains unpaid upon their subscriptions but does not affect rights and liabilities which accrued prior to its enactment, and the above suit was instituted in 1886.

⁹¹ *Miller v. Murphy*, 17 Colo. 408, 30 Pac. 46.

right of the corporate directory to corporate control, and expresses primarily the conditions which must precede the right of the stockholders to protect the corporation in cases where the directory is derelict; but the requirements of the rule may be dispensed with where they do not apply by reason of the antagonism between the directory and the corporate interest. Said rule is intended to have a practical application, and it does not apply where the corporate interests can only be protected by a suit, which, if successful, would be detrimental to all the directors in other capacities. So where stockholders of a lessor corporation sued, for its benefit, the lessee corporation, the directors of the two corporations being almost identical and the lessee corporation also owning, or holding the voting power, of sufficient stock of the lessee corporation to control a stockholder's meeting, the fact that the stockholders bringing the suit made no demand for relief upon the board of directors nor any effort to obtain relief at a stockholders' meeting does not prevent them from maintaining the bill.⁹² Nor under said Equity Rule 94 is it necessary to make demand upon the corporate authorities to sue if it is apparent from the bill that such a demand would be useless and it is not a condition precedent to a suit.⁹³ If the averments of the bill show that the corporation is controlled by defendants, Equity Rule 94 does not require a stockholder complainant to set out, what his efforts were to induce action by the corporation.⁹⁴ A stock-

⁹² Delaware & Hudson Co. v. Albany & Susquehanna Ry. Co., 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. 540. *Quare*, and not decided, whether stockholders have power to compel directors to institute suits to which the latter are opposed. See as to Equity Rule 94; Church v. Citizens' Street Ry. Co. (U. S. C. C.), 78 Fed. 526; Excelsior Pebble Phosphate Co. v. Brown (U. S. C. C.), 74 Fed. 321, 42 U. S. App. 55, 20 C. C. A. 428.

⁹³ Eldred v. American Palace-Car Co. (U. S. C. C.), 99 Fed. 168. See also Weir v. Bay State Gas Co. (U. S. C. C.), 91 Fed. 940.

⁹⁴ Berwind v. Canadian Pac. Ry. Co. (U. S. C. C.), 98 Fed. 158.

Equity Rule 94; When demurrer sustained because complainant had not by averments in his bill brought himself within the directions prescribed by Equity Rule 94, 104 U. S. ix-x, respecting suits brought by stockholders in a corporation against the corporation and other parties, founded on rights which might be properly asserted by the corporation. Quincy v. Steele, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. 496, 520.

holder's bill to set aside a sale of property by the corporation based on fraud of the president and directors cannot be maintained under Equity Rule 94 unless it is shown by the bill that a demand was made upon the stockholders to take action and the cause of the failure of the efforts made and the nature of such efforts.⁹⁶

§ 311. Judgment Creditor's Right to Sue—Parties—Conditions Precedent.

If judgment creditors, who have established a corporation's insolvency by judgment and an unsatisfied execution, sue the stockholders to recover unpaid subscriptions other creditors may join with them in the suit without first establishing their claims by judgments.⁹⁶ Where a corporation as creditor recovers judgment against another corporation for the purchase price of goods, and an execution is issued and returned unsatisfied, and the corporation becomes insolvent, such creditor cannot thereafter charge the stockholders of the corporation as partners or its officers or trustees with the debt, there being no fraudulent intent alleged and proved; as the State alone can complain of the violation of its laws; and the fact that judgment was recovered against the corporation affords conclusive evidence that the trustees in contracting the debt did not exceed their authority. This applies even though the capital stock of the corporation was not fully subscribed at the time the debt was contracted.⁹⁷ If a judgment is obtained against a foreign corporation in a State where it has its principal place of business, creditors can sue stockholders there without first obtaining judgment against the corporation in the State where it was incorporated and in which it has no assets.⁹⁸

§ 312. Order of Court Requiring Remedies to Be Exhausted—Statute Limitations.

An order of the court requiring all remedies to be exhausted

⁹⁶ *Macon D. & S. R. Co. v. Shailer* (U. S. C. C. A.), 141 Fed. 585.

⁹⁷ *Williams v. Chamberlain*, 29 Ky. L. Rep. 606, 94 S. W. 29.

⁹⁸ *American Radiator Co. v. Kinnear* (Wash., 1909), 105 Pac. 630.

⁹⁹ *McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900.

against stockholders primarily liable for the debts of a bank before its reorganization, before enforcing assessment against stockholders secondarily liable to creditors, must receive a reasonable construction and not a technical one. It is not to be construed as requiring the exhaustion of all remedies against stockholders primarily liable in favor of whom the statute of limitations has run.⁹⁹

⁹⁹ State ex rel. Pope v. Germania Bank of St. Paul, 106 Minn. 446, 453, 119 N. W. 61. This was not an original action to enforce the liability of stockholders, but a proceeding to secure the distribution of a fund paid into court by certain stockholders (appellants) in full of their stock liability upon condition that, if for any reason it should be determined that there was an overpayment the amount should be repaid. The case was one of a petition by a receiver of an insolvent bank for the annulment of an order which restrained the receiver from enforcing an assessment against stockholders in the bank secondarily liable to creditors and praying that he be ordered to distribute a certain fund to the creditors. Two orders were made, one discharging the restraining order and decreeing that all remedies against the persons primarily liable had been substantially exhausted, and the other that said fund be distributed according to law by the receiver with other moneys now or which may hereafter come into his hands. From the latter order there was an appeal, affirmed.

CHAPTER XVIII

ACTIONS AT LAW—LIABILITY, GENERALLY

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| <p>§ 313. Form of Action—Effect of Code Provisions, Generally.</p> <p>314. Actions Under Statutes, Generally.</p> <p>315. Ejectment.</p> <p>316. Forcible Entry and Detainer.</p> | <p>§ 317. Liability of Corporations to Third Persons for Negligent, Willful, Wanton or Malicious Acts of Servants.</p> <p>318. Negligent Acts of Corporations, Generally.</p> <p>319. Election—Form of Action—Contract or Tort; Waiver.</p> |
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§ 313. Form of Action—Effect of Code Provisions, Generally.

Notwithstanding a provision of a civil code abolishes all distinctions between actions at law and suits in equity and the common-law forms of actions and suits, still the rules of law which govern and control the manner of enforcing a cause of action must of necessity depend upon the nature of the cause of action sought to be enforced, and, until the nature of the cause of action, if any, arising out of a given state of facts pleaded is determined, the rules of law governing the case are impossible of ascertainment and application.¹ "While it is true that the Code has abolished the distinctions between actions at law and suits in equity, and has provided that there shall be but one form of action for the enforcement and protection of private rights and the redress and prevention of private wrongs, yet there still exist certain elements or features pertaining to actions which are unchanged thereby. These do not belong to the action as a judicial instrument for establishing a right, but inhere to and belong to the primary and remedial rights themselves. For the enforcement and protection of these rights but one form of action exists, but, as

¹ *Carbondale Investment Co. v. Burdick*, 67 Kan. 329, 72 Pac. 781.

to the remedies which lie back of all forms of action, the law still recognizes and observes distinctions which are as vital as before the Code. It is just as necessary to-day as it ever was that a suitor should so state his cause of action that the court may determine whether it be *ex contractu* or *ex delicto*."² Under the code system of California the court may grant any relief, legal or equitable, to which a party may be entitled, and the mere fact that the plaintiff in framing the complaint proceeded upon a certain theory of his rights affords no ground for sustaining a general demurrer if the complainant allege facts which entitle him to relief upon some other theory.³

§ 314. Actions Under Statutes, Generally.

A person discriminated against by an express company may hold such company liable in damages for the excess paid by him over that charged to others, where a statute provides that the railroad commissioner may fix rates or charges for certain public service corporations and also obligating such companies to fix rates without discrimination and making them liable, for extortionate charges, in a civil or criminal action.⁴

Charges involuntarily paid to a gas company by a private consumer in excess of the rates prescribed by the ordinance under which the company is operating may be recovered back, although a right of action therefor is not expressly conferred by the ordinance which prescribes the rates.⁵ If statutory double damages are provided for in case of baggage lost or carelessly or willfully injured by a railroad company such enactment applies to personal baggage and does not authorize a recovery of such damages by a traveling salesman for the loss of his sample case even though it was checked as baggage.⁶ Again, a transferee of warehouse receipts which designate and

² *Dessert Lumber Co. v. Wadleigh*, 103 Wis. 318, 79 N. W. 237, per Bardeen, J.

³ *Bell v. Bank of California* (Cal., 1908), 94 Pac. 889, 891.

⁴ *American Express Co. v. Crawley*, 88 Miss. 525, 41 So. 261.

⁵ *Pingree v. Mutual Gas Co.*, 107 Mich. 156, 2 Det. L. N. 639, 65 N. W. 6. Assumpsit to recover overcharges for gas furnished.

⁶ *New Orleans & Northeastern Rd. Co. v. Shackelford*, 87 Miss. 610, 40 S. W. 427.

guarantee the grade and quantity of wheat stored may, under a statute requiring the delivery of the commodity stored to the owner of the receipts on their delivery, hold the warehouseman liable for damages for the refusal to deliver to him the wheat demanded and delivering an inferior grade of wheat.⁷

§ 315. Ejectment.⁸

Ejectment may be maintained by the holder in trust of the legal title to property for a religious corporation against one in possession without a legal or equitable title.⁹ And where a railroad has been granted public lands by Congress it may

⁷ *Lawson v. Genesee Farmers' Alliance Joint Stock Co.* (Idaho, 1895), 43 Pac. 191. Action brought under the provisions of an act entitled, "An act governing the storage of grain, flour, wool or other produce when received for storing, shipping, grinding or manufacturing," approved January 15, 1891 (1 Sess. Laws, p. 12), to recover damages for an alleged breach of contract contained in warehouse receipts issued by defendant on receipt of certain wheat delivered to it for storage by the transferor of the receipts.

⁸ See § 313, herein.

⁹ *Church of Christ v. Reorganized Church of Jesus Christ of L. D. S.* (U. S. C. C.), 71 Fed. 250, 1 C. C. A. 397, 36 U. S. App. 379, aff'd in 70 Fed. 179, 17 C. C. A. 387, 36 U. S. App. 110.

What title and possession a sufficient basis of action of ejectment, see the following cases:

United States: *Valcalda v. Silver Peak Mines* (U. S. C. C. A.), 86 Fed. 90, 56 U. S. App. 666, 29 C. C. A. 591; *Northern Pac. Rd. Co. v. Cannon*, 46 Fed. 237.

Alabama: *Jackson Lumber Co. v. McCreary*, 136 Ala. 278, 34 So. 850 (on strength of plaintiff's own title); *McClendon v. Equitable Mtge. Co.*, 122 Ala. 384, 25 So. 30.

California: *Southern Pacific R. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032 (railroad grantee of public lands may maintain ejectment against prior occupant without title).

Colorado: *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212 (on strength of plaintiff's own title).

Indiana: *Silver Creek Cement Corp. v. Union Lime Co.*, 138 Ind. 297, 35 N. E. 125 (on strength of plaintiff's own title).

Iowa: *Lathrop v. American Emigrant Co.*, 41 Iowa, 547 (on strength of plaintiff's own title).

Michigan: *Michigan Cent. R. Co. v. McNaughton*, 45 Mich. 87, 7 N. W. 712.

Nebraska: *Chicago, Burlington & Quincy Rd. Co. v. Schalkopf*, 54 Neb. 448, 74 N. W. 826 (on strength of plaintiff's own title).

New Mexico: *New Mexico Rio Grande & P. R. Co. v. Crouch*, 4 N. M. 141,

maintain ejectment therefor against persons holding under void subsequent patents.¹⁰ If land, however, is excepted from a claimed grant of land to a railroad company it cannot maintain ejectment therefor even though defendant has no valid claim thereto.¹¹

Ejectment cannot be maintained against a railroad company if the landowner, knowing that such company has entered upon his land and is engaged in constructing its road without having complied with the statutes requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work; in such case he will be restricted to a suit for damages.¹² So where a railroad company acting under a contract of purchase of land enters thereupon with the owner's consent, part of the purchase price having been paid and promissory notes taken for the balance, and at a great expense places its tracks, etc., thereon, the owner, who has reserved the title in himself until satisfaction of the notes, cannot maintain ejectment therefor notwithstanding the nonpayment of the notes and the bar of

13 Pac. 201 (one expelled from public lands by those without better title may maintain ejectment under statute).

Rhode Island: *New York, New Haven & Hfd. Rd. Co. v. Horgan*, 25 R. I. 408, 56 Atl. 179.

Tennessee: *Bleidorn v. Pilot Mountain Coal & M. Co.*, 89 Tenn. 166, 204, 15 S. W. 737.

Texas: *Sebastian v. Martin Brown Co.*, 75 Tex. 291, 12 S. W. 986 (on strength of plaintiff's own title); *Parker v. Fort Worth & D. C. R. Co.*, 71 Tex. 132, 8 S. W. 541.

Virginia: *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 23.

West Virginia: *Holly River Coal Co. v. Howell*, 36 W. Va. 489, 15 S. E. 214.

As to requisite title, possession, etc., as basis of action generally, see article "Ejectment" by Joseph A. Joyce and Howard C. Joyce. 15 Cyc. pp. 17 *et seq.*

¹⁰ *Northern Pacific Rd. Co. v. Miller*, 20 Wash. 21, 54 Pac. 603.

¹¹ *De Lacey v. Northern Pac. R. Co.* (U. S. C. C. A.), 72 Fed. 726, 19 C. C. A. 157, 44 U. S. App. 257.

¹² *Donohue v. El Paso & Southwestern Ry. Co.*, 214 U. S. 499, 53 L. ed. 1060, 29 Sup. Ct. 698, relying upon *Northern Pacific Ry. Co. v. Smith*, 171 U. S. 280, 43 U. S. 157, 18 Sup. Ct. 794; citing *New York, City of, v. Pine*, 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. 593; *Roberts v. Northern Pacific Ry. Co.*, 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. 756.

the statute of limitations.¹³ The owner of land may also be precluded by statutory provisions for proceedings for assessment of damages and the charter of a railroad corporation, from maintaining ejectment for a portion of a right of way of a corporation with power to obtain the same by condemnation, gift or purchase and who has acquired it by purchase from a regularly created corporation.¹⁴ And the mere ownership of the shore, where title stops at the water's edge by reason of the public character of such water, does not entitle one to maintain ejectment to obtain possession of land beyond the water's edge.¹⁵

In a Pennsylvania case a railroad company, holding town lots adjoining their roadbed, ostensibly for a basin to connect with river navigation, having mortgaged the entire road with its corporate privileges and appurtenances, but without specific mention of the lots, became embarrassed, under proceedings thereon by the sheriff; the lots having been sold under execution against the company and bought by the plaintiffs therein, in an ejectment therefor by them against the purchasers under the mortgage, the jury were instructed that if the lots were not appurtenant to the road and essential and indisputably necessary to the enjoyment of its franchises, and as such included in the mortgage, the plaintiffs were entitled to recover, referring the question of appurtenancy and necessity to them as matters of fact. It was held that the instruction was not error.¹⁶ If telegraph poles are placed on a public highway over plaintiff's land and no compensation therefor has been paid ejectment lies to compel the removal of such poles.¹⁷ So a purchaser of land over which a telegraph

¹³ *Atlanta, K. & N. Rd. Co. v. Barker*, 105 Ga. 534, 31 S. E. 452.

¹⁴ *Saunders v. Memphis & R. S. R. Co.*, 101 Tenn. 206, 47 S. W. 155.

¹⁵ *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N. W. 855, rehearing denied, 85 N. W. 402. Land covered by the waters, lakes or ponds, or by water partaking of like character as regards public rights, though in form conveyed by a Federal or State patent, is vested in the State the same after such conveyance as before, such conveyance, as to such land, being absolutely void; title to such land to high water mark enjoyed to same extent as were tidal waters by rules of common law.

¹⁶ *Shamokin Valley Rd. Co. v. Livermore*, 47 Pa. 465.

¹⁷ *Postal Telegr. Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365.

company has, without right, constructed its lines may bring ejectment, inasmuch as such purchaser succeeds to all the grantor's rights.¹⁸ Where a statutory remedy is made exclusive of all other remedies and land has been appropriated by a levee board, ejectment therefor and for damages cannot be maintained.¹⁹ Where the plaintiffs' case, as set forth in their complaint in ejectment, merely states a reliance on the Fifth Amendment to the Constitution and on a certain article of a treaty and the Circuit Court decided no question as to the application or construction of the Constitution or the validity or construction of the treaty the Federal Supreme Court is without jurisdiction to review on a writ of error the action of that court. A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment below can be raised on the ground of error in the disposal of such a claim by its decision. The same rule is applicable to a treaty.²⁰

§ 316. Forcible Entry and Detainer.²¹

There is nothing in the nature of the possession of a railroad, or of a section of a railroad, which takes it out of the operation of the language of the statutes of Arkansas against forcibly entry and detainer, or out of the general principle which lies at the foundation of all suits of forcible entry and detainer, that the law will not sanction or support a possession acquired by violence, but will, when appealed to in this form of action, compel the party who thus gains possession to sur-

Whether additional burden on abutting owners imposed by telegraph and telephone and electric railway lines in street, see Joyce on Electric Law (2d ed.), §§ 295-348.

¹⁸ Postal Teleg. Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722.

¹⁹ Owens v. Yazoo, Mississippi Delta Levee Rd., 74 Miss. 269, 21 So. 12.

²⁰ Muse v. Arlington Hotel Co., 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. 109.

²¹ See § 313, herein.

render it to the party whom he dispossessed, without inquiring which party owns the property or has the legal right to the possession.²² So where a statute makes one guilty of forcible entry and detainer without regard to the manner of his acquiring real property where he unlawfully, by force, menaces and threats of violence, retains possession of and holds such property, an action of forcible entry and detainer may be maintained against a corporation where it keeps possession of land for two years after judgment against it for possession, and for damages for unlawful detainer, and after demand made for the possession.²³

§ 317. Liability of Corporations to Third Persons for Negligent, Willful, Wanton or Malicious Acts of Servants.²⁴

It may be stated here as the basis of remedies against a corporation that the rules as to the liability of a master for the negligence, want of skill, or willful acts of his servant apply equally to corporations as to private individuals.²⁵ So for the torts of a servant the liability of a railroad company is limited to those done within the scope of the employment in furtherance of its business.²⁶ And under a much cited and relied upon case in the Federal Supreme Court a master is liable for the tortuous acts of his servant, when done in the course of his employment, although they may be done in disobedience of the master's orders. Thus where a suit was brought against a railroad company, by a person who was injured by a collision, it was correct in the court to instruct the jury, that, if the

²² *Iron Mountain & Helena R. R. v. Johnson*, 119 U. S. 608, 30 L. ed. 504, 7 Sup. Ct. 339.

Degree of force necessary to bring entry within statute, see *Smith v. Detroit Loan & B. Assoc.*, 115 Mich. 340, 4 Det. L. N. 916, 73 N. W. 395, 39 L. R. A. 410.

Sufficiency of title or possession as basis of action of forcible entry and detainer, see *Chicago, P. & St. L. Ry. Co. v. Vaughn*, 99 Ill. App. 386; *Rochester v. Gate City Mining Co.*, 86 Mo. App. 447.

²³ *Eccles v. Union P. Coal Co.*, 15 Utah, 14, 48 Pac. 148.

²⁴ See § 313, herein.

²⁵ *Evansville & Crawfordsville Rd. Co. v. Baum*, 26 Ind. 70. See also *Central of Georgia Ry. Co. v. Brown*, 113 Ga. 414, 38 S. E. 989.

²⁶ *Jones v. Seaboard Air Line Ry. Co.*, 150 N. C. 473, 64 S. E. 205.

plaintiff was lawfully on the road, at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he was entitled to recover, notwithstanding the circumstances, that the plaintiff was a stockholder of the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars. And, also, that the fact that the engineer having control of the colliding locomotive, was forbidden to run on that track at the time, and had acted in disobedience of such orders, was no defense to the action.²⁷ Under the Louisiana Civil Code²⁸ the responsibility of masters is confined to damages occasioned by their servants in the "exercise of the functions in which they are employed," and they are not liable for collateral torts committed by servants while attending to the duties of their employment.²⁹

In Minnesota a master is responsible for the torts of his servant, done in the course of his employment with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done willfully, but within the scope of his agency, or in excuse of his authority, or contrary to the express instructions of the master.³⁰

Under a New York case the rule is declared that for acts of the servant done within the general scope of his employment and while engaged in the master's business, and done with a view to the furtherance of that business and the master's interest the latter will be responsible, whether the act be done negligently, wantonly, or even willfully.³¹

²⁷ *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. (55 U. S.) 468, 14 L. ed. 502.

²⁸ Article 2320.

²⁹ *Vara v. R. M. Quigley Construction Co.*, 114 La. 261, 38 So. 102.

³⁰ *Barrett v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 106 Minn. 51, 117 N. W. 1047, 18 L. R. A. (U. S.) 416.

³¹ *Wallace v. John A. Casey Co.*, 116 N. Y. Supp. 394, 132 App. Div. 35, 41, per Miller, J., citing and quoting from *Mott v. Consumers' Ice Co.*, 73 N. Y. 543. The company, however, in the principal case, was held not liable under the rule that the recipient of charity assumes the risk of negligence of the donor's servant.

Under an Ohio decision the test of the master's liability is not whether the act of the servant was done during the existence of the employment, but whether it was done while engaged in the service of and while acting for the master in the prosecution of his business. If not so employed the master is not liable.³²

³² *Lima Ry. Co. v. Little*, 67 Ohio St. 91, 65 N. E. 861.

When corporation not liable for acts of servant; injuries to third persons, see the following cases:

United States: *St. Louis Southwestern Ry. Co. v. Harvey*, 144 Fed. 806, 75 C. C. A. 536 (railroad company not liable for servant's acts not done within the scope of employment nor in conducting master's business nor by acts of servant in using master's facilities without his consent); *Bowen v. Illinois Cent. R. Co.*, 136 Fed. 306, 69 C. C. A. 444.

Alabama: *Palos Coal & Coke Co. v. Benson* (mem.), 145 Ala. 664, 39 So. 727 (mining company not liable for *assault* committed by servant when not done within line of duties).

Arkansas: *St. Louis & San Francisco Rd. Co. v. Wyatt*, 84 Ark. 193, 105 S. W. 72 (carrier not liable for *assault* by servant outside of scope of employment and done when not on duty).

Illinois: *Illinois Steel Co. v. Zolnowski*, 118 Ill. App. 209 (not liable unless done in course of employment, etc.); *Belt Railway Co. v. Banicki*, 102 Ill. App. 642 (trespass in case for *personal injuries*; employment of watchman to keep trespassers away does not give authority to *shoot them*; master not responsible for acts of servant done outside of master's business and done to accomplish some end personal to servant).

Indiana: *Louisville & Nashville Rd. Co. v. Gillen*, 166 Ind. 321, 76 N. E. 1058 (master not liable where acts of servant are independent of his employment or duty or of his master's business); *Louisville, New Albany & Chicago Ry. Co. v. Palmer*, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400 (not liable unless done within scope of employment, etc., *damage to land by fire*).

Kansas: *Hudson v. Missouri, Kansas & Texas Ry. Co.*, 16 Kan. 470 (master not liable unless servant's acts done within scope of employment, etc.; action to recover from railway company for *personal injuries*).

Kentucky: *Mace v. Ashland Coal & Iron Ry. Co.*, 118 Ky. 885, 26 Ky. L. Rep. 865, 82 S. W. 612 (where complaint *does not show that alleged malicious or mischievous act* of servant was connected with his duty to master or done in the exercise of that duty no cause of action is stated).

Louisiana: *McDermott v. American Brewing Co.*, 105 La. 124, 29 So. 498, 83 Am. St. Rep. 225, 52 L. R. A. 684 (*assault* by servant; held to have acted outside of scope of employment and company not liable).

Maine: *Moran v. Rockland, Thomaston & Camden St. Ry. Co.*, 99 Me. 127, 58 Atl. 176 (when servant acting without employer's authority and beyond scope of employment master not responsible; action on case for negligence of railroad corporation causing *injuries and death*).

§ 318. Negligent Acts of Corporations, Generally.³³

A passenger on a railroad sued it and its receiver in an action at law in a State Court to recover for injuries received

Massachusetts: Fairbanks v. Boston Storage Warehouse Co., 189 Mass. 419, 75 N. E. 737, 109 Am. St. Rep. 646 (*assault* committed by servant; not within scope of his employment; company not liable); Brown v. Boston Ice Co., 178 Mass. 108, 59 N. E. 644, 86 Am. St. Rep. 469 (*injury inflicted on children* done outside of scope of employment; master not liable).

Michigan: Wiltse v. State Road Bridge Co., 63 Mich. 639, 30 N. W. 370 (master's responsibility grows out of, is measured by and begins and ends with his control of his servant; action on case; bridge corporation held not liable); Wood v. Detroit City Ry. Co., 52 Mich. 402, 50 Am. St. Rep. 259, 18 N. W. 124 (corporation not liable if act of servant was *willful*); Chicago & Northwestern Ry. Co. v. Bayfield, 37 Mich. 205 (master not liable for *wrong intentionally or recklessly done* by servant beyond the scope of his business, that is, for personal trespass or tort of servant).

Minnesota: Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133, 56 R. A. (N. S.) 598 (company not liable for wrongful acts of servant causing injury when done outside of the duty for which employed); Johnson v. Pioneer Fuel Co., 72 Minn. 405, 75 N. W. 719 (corporation not liable for *assault* by servant not done in scope of or in furtherance of corporation's business); Peterson v. Western Union Teleg. Co., 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 8 Am. & Eng. Corp. Cas. (N. S.) 517 (telegraph company not liable for the transmission by its operator of a *libelous message* if act lawful).

Mississippi: Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147, 28 So. 823, 84 Am. St. Rep. 620 (acts of servant independent of business or employment company not liable).

Missouri: Walker v. Hannibal & St. Joseph Rd. Co., 121 Mo. 575, 26 S. W. 360, 42 Am. St. Rep. 547, 24 L. R. A. 363 (railroad company not liable unless servant's tortious acts done in course of employment); Haehl v. Wabash Rd. Co., 119 Mo. 325, 24 G. W. 737 (company not liable for *assault* of servant not done in scope of or to further corporation's business).

New Hampshire: Rowell v. Boston & M. R. Co., 68 N. H. 358, 44 Act. 488 (done for own purpose and not to further master's orders or work; master not liable).

New Jersey: Kiernan v. New Jersey Ice Co., 74 N. J. L. 175, 63 Atl. 998 (*assault* of boy on ice wagon by driver; company not liable); Hollie v. Sanford Ross, 68 N. J. L. 324, 53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546, rev'g 67 N. J. L. 60, 50 Atl. 342 (plaintiff was shot by watchman; nonsuit).

New York: Sharp v. Erie Rd. Co., 184 N. Y. 100, 76 N. E. 923. See *Id.*, 85 N. Y. Supp. 553, 90 App. Div. 502 (railroad company not liable for act of detective in *killing boy trespasser* where act was *malicious* or to affect his own purpose); Hogle v. H. H. Franklin Mfg. Co., 112 N. Y. Supp. 881, 128 App. Div. 403 (master not liable for *malicious acts* of servants unless he has

³³ See § 313, herein.

when traveling on its road while it was in the hands of the receiver. The case was removed to the Federal Circuit Court where a trial was had. The receivership had been terminated knowledge of thereof and fails to use reasonable means to suppress the same); *Franklin v. Brooklyn Daily Eagle*, 99 N. Y. Supp. 300, 113 App. Div. 443 (newspaper publisher not liable for *assault* by employé not done within scope of employment); *Feneran v. Singer Mfg. Co.*, 47 N. Y. Supp. 284, 20 App. Div. 574 (*assault* by servant committed while doing act contrary to instructions; company not liable).

North Carolina: *Daniel v. Atlantic Coast Line Rd. Co.*, 136 N. C. 517, 48 S. E. 816; 67 L. R. A. 455 (action for *malicious prosecution and false arrest and imprisonment*; railroad company not liable for acts of agent in causing arrest there being no proof of previous authority or of ratification).

Rhode Island: *Bemton v. James Hill Mfg. Co.*, 26 R. I. 192, 58 Atl. 664 (company not liable for *willful assault* not done in performance of any duty due master).

South Dakota: *Waler v. Great Northern Ry. Co.*, 18 S. Dak. 420, 100 N. W. 1097, 112 Am. St. Rep. 794, 70 L. R. A. 731 (railroad company not liable for *assault* committed by direction of servant but not done within scope of his authority).

Texas: *St. Louis Southwestern Ry. Co. of Texas v. Mayfield*, 35 Tex. Civ. App. 82 (railroad company not liable for *injury to trespasser* where servant is doing something master has not ordered done or to exercise discretion concerning; burden of proof on plaintiff to show wrongful act was done in prosecution of master's business); *Lytle v. Crescent News & Hotel Co.*, 27 Tex. Civ. App. 530, 66 S. W. 240 (master not liable where servant's acts in *shooting another* are independent of employment and not within scope thereof).

Washington: *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355 (where act of servant is not within scope of authority a railroad company is not liable for *injuries sustained by a boy falling off a hand car loaned by said servant*).

When corporation liable for acts of servant; injuries to third persons, see the following cases:

United States: *Pendleton v. Kinsley*, 3 Cliff (U. S. C. C.), 416, Fed. Cas. No. 10,922 (case to recover damages for injuries resulting to passenger from *assault and battery* inflicted upon him by steamboat clerk. The principal in this class of cases is liable for misconduct of employé when it occasions injury to the passenger *whether arising from malice or neglect*).

Alabama: *Palos Coal & Coke Co. v. Benson* (mem.), 145 Ala. 664, 39 So. 727 (liable for torts of servants done or caused to be done in or about the duties or business assigned to them); *City Delivery Co. v. Henry*, 139 Ala. 161, 34 So. 389 (master liable for *injuries willfully and intentionally inflicted* by servant acting within scope or line of employment).

Arkansas: *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560 (collision of vessels and *loss of cattle*).

California: *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672.

before the commencement of the action, and the property had by order of the court been transferred to the company. The company contended that it was not liable, or, if liable, that the claim could only be enforced in equity. The trial resulted in a

Georgia: Southern Ry. Co. v. James, 118 Ga. 340, 45 S. E. 303, 63 L. R. A. 257 (liable for *wanton and reckless act* of servant *in shooting tramp* when act done to further master's business and while acting under authority to arrest persons stealing rides on trains).

Illinois: Illinois Cent. Ry. Co. v. King, 179 Ill. 91, 53 N. E. 552, aff'g 77 Ill. App. 581 (liable for *willful and malicious act* of servant done within scope of employment and duty); Chicago, Burlington & Quincy Rd. Co. v. Sykes, 96 Ill. 162 (action for damages against railroad company for *causing death* of one about to take a train); Northwestern Rd. Co. v. Hack, 66 Ill. 238 (*boy trespasser injured* by wrongful act of servant of railroad company); Chicago Rd. Co. v. Dickson, 63 Ill. 151, 14 Am. St. Rep. 114 (*wanton and malicious acts* of employee of railroad company; company liable); Toledo, Wabash & Western Ry. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489 (injury caused by act of engineer in *negligently and maliciously* letting steam escape, *frightening horses*); Ziegenhein v. Smith, 116 Ill. App. 80 (trespass for *assault* committed by servant to further purpose for which employed); Alton Ry. & Illuminating Co. v. Cox, 84 Ill. App. 202 (liable for torts of servant done within scope of employment).

Indiana: Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Sullivan, 141 Ind. 83, 40 N. E. 138, 50 Am. St. Rep. 313, 27 L. R. A. 840 (corporation liable for *servant's wrongful or willful act* done within scope of general authority although indirectly authorized); Citizens' Street Rd. Co. of Indianapolis v. Willooby, 134 Ind. 563, 33 N. E. 627 (master liable when servant acting within scope of employment *willfully inflicts injury* on another); Indiana, Bloomington & Western Ry. Co. v. Burdge, 94 Ind. 46 (allegation that injury to passenger on railroad was caused by acts of company's agent done in a *willful, reckless, careless and unlawful manner* is good on demurrer, but there must be *proof that act was willful*); Pittsburg, Cincinnati & St. Louis Rd. Co. v. Theobald, 51 Ind. 246 (*injury to passenger*); Jeffersonville Rd. Co. v. Rogers, 38 Ind. 116, 10 Am. St. Rep. 103 (*ejection of passenger*; general rule as to liability of corporation for agent's acts stated).

Kentucky: Sherley v. Billings, 71 Ky. (8 Bush) 147, 8 Am. St. Rep. 451 (steamboat owners liable for *assault* upon passenger by a clerk of the boat); Hawkins & Co. v. Riley, 56 Ky. (17 B. Mon.) 101 (proprietors of stage coaches liable for *recklessness or negligence of drivers*); Illinois Cent. Rd. Co. v. Martin, 33 Ky. L. Rep. 666 (liable whether act of is *negligent or wanton*); Licking Rolling Mill Co. v. Fischer, 8 Ky. L. Rep. 89 (*trespass for loss by fire*; corporation liable for servant's *wrongful and willful acts* done within scope of employment and in discharging master's business).

Louisiana: Keene v. Lizardi, 3 La. 273 [5 La. (O. S.) 431], 25 Am. Dec. 197 (owners of vessels—master liable for *inhuman abuse of passenger*), *Id.*, 3 La. 505 [6 La. (O. S.) 315, 26 Am. Dec. 478].

verdict and judgment for the plaintiff. It was held that the company was liable to the plaintiff in an action at law for the damages found by the jury; that as the railway company had procured, or, at least, acquiesced in the withdrawal of the re-

Maine: Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. St. Rep. 39 (common carrier of passengers responsible for *willful misconduct* of servant towards passenger).

Maryland: Baltimore Consol. Ry. Co. v. Pierce, 89 Md. 495, 45 L. R. A. 527, 43 Atl. 940 (*injuries* sustained through alleged negligence of motor-man; rule stated that *willful injury* done by servant in course of employment renders master liable).

Massachusetts: Aiken v. Holyoke Street Ry. Co., 184 Mass. 269, 68 N. E. 238 (tort against street railway company for *personal injuries* caused by motorman; *reckless or willful acts* of servant done in course of employment renders master liable); Krulwitz v. Eastern Rd. Co., 140 Mass. 573, 575, 5 N. E. 500 (tort for *assault and false imprisonment, also for malicious prosecution*; passenger prosecuted by conductor of railroad for fraudulently evading fare; "want of probable cause and malice on the part of the conductor, if established may be imputed to corporation"); Reed v. Home Sav. Bank, 130 Mass. 443, 445, 39 Am. St. Rep. 468; (*malicious prosecution*; fraud or malice of authorized agents imputed to corporation).

Michigan: Chicago & Northwestern Ry. Co. v. Bayfield, 37 Mich. 205 (responsible for acts of servant done in furtherance of master's interests and within scope of his business, but done in excess or even disobedience of his orders).

Minnesota: Lesch v. Great Northern Ry. Co., 93 Minn. 435, 101 N. W. 965 (master is responsible for the acts of his servants if committed with a view of the furtherance of the master's business, whether the same be *negligently or willfully done*; corporation liable on this case for *acts of trespass* of watchmen employed to watch its property and search for same when taken away); Peterson v. Western Union Teleg. Co., 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 8 Am. & Eng. Corp. Cas. (N. S.) 517 (telegraph company liable for the transmission by its operator of a *libelous message* if act wrongful, and this is so irrespective of the question of negligence).

Mississippi: Barmore v. Vicksburg, Shreveport & Pacific Ry. Co., 85 Miss. 426, 70 L. R. A. 627, 38 So. 210 (railroad company held liable for servant's gross negligence and wanton injury to trespasser on track; *master to escape liability must prove* that servant had abandoned duties of his employment and gone about some purpose of his own not incident to but independent of scope of employment).

Missouri: Ephland v. Missouri Pacific Ry. Co., 137 Mo. 187, 37 S. W. 820, 35 L. R. A. 107, 50 Am. St. Rep. 498, 38 S. W. 926 (railroad company held liable for acts of servant though not done in performance of express duty; master liable for acts of servant committed in course of employment); Haehl v. Wabash Rd. Co., 119 Mo. 325, 24 S. W. 737 (railroad company liable for act of watchman, whose duty was to keep trespassers off defend-

ceivership and the discharge of the receiver, and the cancellation of the bond, and had accepted the restoration of its road largely increased in value by the betterments, a ground was ant's bridge, in *shooting and killing a trespasser*; exemplary damages were awarded under code); *Malecek v. Tower Grove, etc.*, R. Co., 57 Mo. 17 (*assault and abuse of passenger*; admissions of agent when binding); *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315, 17 Am. Rep. 653 (*malicious prosecution* by railroad company; liability for agent's malicious acts).

Nebraska: *Chicago, Rock Island & Pacific Ry. Co. v. Kerr*, 74 Neb. 1, 104 N. W. 49 (*personal injuries* caused by negligence of railroad company's servant; company liable for servant's *negligent, wanton, willful, or malicious acts* done within scope of employment and while about his master's business).

Nevada: *Quigley v. Central Pacific R. Co.*, 11 Nev. 350, 21 Am. St. Rep. 757 (railroad corporation liable for *wanton acts* of agents, per Hawley, C. J.).

New Jersey: *Brokaw v. New Jersey R. Co.*, 32 N. J. L. 328, 90 Am. Dec. 659 (*ejection of plaintiff from railroad car* by servant of company).

New York: *Sharp v. Erie Rd. Co.*, 184 N. Y. 100, 76 N. E. 923, see *Id.*, 85 N. Y. Supp. 553, 90 App. Div. 502 (railroad company liable for act of detective in *killing boy* trespasser stealing, where act done within scope of employment though servant exceeds his authority or disregards orders); *Mott v. Consumers' Ice Co.*, 73 N. Y. 543 (action to recover damages for injuries alleged to have been sustained through *carelessness of driver of ice cart* of company); *Shea v. Sixth Avenue Rd. Co.*, 62 N. Y. 180, 20 Am. St. Rep. 480 (street car stopped so as to obstruct passage; *traveler* desiring to cross street attempted to cross over car platform and was *thrown off by driver of car*); *Rose v. Imperial Engine Co.*, 112 N. Y. Supp. 8, 127 App. Div. 885 (master liable for acts of servant or agent done in course of employment even if *wanton or malicious*, *Id.*, 887); *Van Sicklen v. Jamaica Electric Light Co.*, 61 N. Y. Supp. 210, 45 App. Div. 1, aff'd in 168 N. Y. 650, 61 N. E. 1135 (for acts of servant in *injuring property* where act done within scope of employment).

North Carolina: *Pierce v. North Carolina Rd. Co.*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316 (where act of servant *willful and malicious* but is done within scope of employment and discharge of duties, master is liable; *boy frightened by brakeman and killed by train*; company liable).

Ohio: *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 54 N. E. 471, 46 L. R. A. 314, 71 Am. St. Rep. 729 (employer liable for *willful or malicious acts* of his servant done in the course of the servant's employment); *Stranahan Brothers Catering Co. v. Coit*, 55 Ohio St. 398, 4 L. R. A. 506, 45 N. E. 634 (master liable for servant's *malicious acts* whereby others are injured when acts done are within scope of employment and in execution of services for which he was engaged by master).

Pennsylvania: *Pittsburg, Alleghany & Manchester Passgr. Rd. Co. v. Donahue*, 70 Pa. St. 119 (*boy riding on car willfully and wantonly struck by driver*).

Wisconsin: *Croker v. Chicago & Northwestern Co.*, 36 Wis. 657, 17 Am. St. Rep. 504 (*indecent approach and assault* by railroad conductor on female passenger; company liable).

afforded to charge an assumption of such valid claims against the receiver as were not satisfied by him, or by the court which discharged him.³⁴

Payment by a fire insurance company of a claim for property destroyed by the negligence of a railroad company, is not voluntary, and may be recovered back, where the insured had previously made a settlement with the railroad company, receiving payment in full, which fact he concealed from the insurance company, although the latter knew that he was making a claim against the railroad company.³⁵

Evidence of negligence as a warehouseman does not warrant a recovery for negligence of a carrier in a suit against the latter on bills of lading.³⁶

§ 319. Election—Form of Action—Contract or Tort; Waiver.³⁷

There may be a waiver and a suit brought either in contract or tort where there is a breach of contract and fraud.³⁸ So it is settled that for negligence by a common carrier in transporting goods intrusted to it suit may be brought either in tort or contract for damages³⁹ to recover for injuries sustained by a passenger through negligence of the carrier;⁴⁰ and for ejection of a passenger.⁴¹ Again, a tort may be waived and a suit brought in

³⁴ *Texas & Pacific Ry. Co. v. Bloom*, 164 U. S. 636, 41 L. ed. 580, 17 Sup. Ct. 216. See also *Texas & Pacific Ry. Co. v. Johnson*, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. ed. 81, 23 U. S. App. 143, 60 Fed. 979, 9 C. C. A. 300, 85 Tex. 283, 20 S. W. 133.

³⁵ *Chickasaw County Farmers' Mut. F. Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. 443. Action at law to recover money with interest thereon, alleged to have been fraudulently obtained.

³⁶ *Gratiot Street Warehouse Co. v. St. Louis, A. & T. H. R. Co.*, 221 Ill. 418, 77 N. E. 675, aff'g 122 Ill. App. 405.

³⁷ See § 313, herein.

³⁸ *Missouri Savings & Loan Co. v. Rice*, 84 Fed. 131, 28 C. C. A. 305.

³⁹ *Eckert v. Pennsylvania Rd. Co.*, 211 Pa. St. 267, 107 Am. St. Rep. 57, 60 Atl. 781 (action for trespass). See also *Denman v. Chicago, Burlington & Quincy Rd. Co.*, 52 Neb. 140, 71 N. W. 967.

⁴⁰ *McMurtry v. Kentucky Central Rd. Co.*, 84 Ky. 462, 8 Ky. L. Rep. 462, 18 W. 815.

⁴¹ *Louisville & Nashville Rd. Co. v. Hine*, 121 Ala. 234, 25 So. 857; *Chicago, Burlington & Quincy Rd. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 926;

assumpsit;⁴² or on special contract;⁴³ or on an implied promise.⁴⁴ So a bailor may waive the tort arising out of the duty of a bailee, who has come lawfully into the possession of the former's property, and sue in assumpsit based upon the bailee's implied promise under the bailment.⁴⁵ The tort may also be waived and suit brought in assumpsit, where there is a conversion of property;⁴⁶ where there is a trespass, and stone is quarried and used beneficially so that it is unreclaimable;⁴⁷ where there has been an embezzlement or misappropriation by a clerk of a bank's money;⁴⁸ where there has been a misapplication by a bank of moneys to a debt;⁴⁹ where money has been fraudulently obtained from a bank;⁵⁰ where suit is by bank depositor for amount of altered checks in excess of sum for which actually drawn;⁵¹ and where goods are taken in trespass;⁵² and where there is a conversion of property;⁵³ or the party may waive the right to recover in trover and sue on implied con-

Lovings v. Norfolk & Western Ry. Co., 47 W. Va. 582, 35 S. E. 962 ("civil action for the recovery of money due for damages for a wrong;" held that plaintiff could recover whatever he showed himself entitled to recover in the action either *ex contractu* or *ex delicto*).

⁴² *Shober & Carqueville Lithographing Co. v. Schedler*, 63 Ill. App. 48 (conversion of goods).

⁴³ *Denman v. Chicago, Burlington & Quincy Rd. Co.*, 52 Neb. 140, 71 N. W. 967 (transportation of goods by carrier).

⁴⁴ *Hirsch v. Leatherbee Lumber Co.*, 69 N. J. L. 509, 55 Atl. 645 (conversion of personal property).

⁴⁵ *De Loach Mill Mfg. Co. v. Standard Sawmill Co.*, 125 Ga. 377, 54 S. E. 157.

⁴⁶ *Farmers' & Merchants' Bank v. Bennett & Co.*, 120 Ga. 1012, 48 S. E. 398.

⁴⁷ *Phelps v. Church of Our Lady Help of Christians*, 99 Fed. 683, 40 C. C. A. 72.

⁴⁸ *Lipscomb v. Citizens' Bank of Galena*, 66 Kan. 243, 71 Pac. 583.

⁴⁹ *Winfield National Bank v. Railroad Loan & Savings Assoc.*, 71 Kan. 58, 81 Pac. 202.

⁵⁰ *Branch Bank at Montgomery v. Parrish*, 20 Ala. 433.

⁵¹ *Critten v. Chemical National Bk.*, 171 N. Y. 219, 232, 59 L. R. A. 529, modifying 70 N. Y. Supp. 246, 60 App. Div. 241.

⁵² *Florida Central & Pac. Ry. Co. v. Scarlett*, 91 Fed. 349, 33 C. C. A. 554, under Ga. Code, § 3811, Code, 1882, § 2955.

⁵³ *Tidewater Quarry Co. v. Scott*, 105 Va. 160, 164, 52 S. E. 835, 115 Am. St. Rep. 864.

tract.⁵⁴ Again, a shipper may waive the contract and sue the carrier in tort to recover for injury caused by negligence to property in transit.⁵⁵ But tort for a trespass on land cannot be

⁵⁴ *Sage v. Shepard & Morse Lumber Co.*, 39 N. Y. Supp. 449, 9 App. Div. 290, aff'd in (mem.) 158 N. Y. 672, 52 N. E. 1126.

When action ex contractu; carriers:

Alabama: Seaboard Air Line Ry. v. Hubbard, 142 Ala. 546, 38 So. 750 (breach of contract for affreightment of goods); Nashville, Chattanooga & St. Louis Ry. Co. v. Parker, 123 Ala. 683, 27 So. 323 (injuries to horse in transportation and unloading); Louisville & Nashville Rd. Co. v. Brinkerhoff & Co., 119 Ala. 528, 24 So. 885 (failure to deliver goods); Tallassee Falls Mfg. Co. v. Western Ry. of Alabama, 117 Ala. 520, 23 So. 139, 67 A. S. R. 179 (cotton burned).

Georgia: Louisville & Nashville Rd. Co. v. Spinks, 104 Ga. 692, 30 S. E. 698 (breach of contract to transport person).

Kentucky: Lexington & Eastern Ry. Co. v. Lyons, 104 Ky. 23, 28, 20 Ky. L. Rep. 516, 46 S. W. 209 (ejection of passenger); Chicago & Eastern Rd. Co. v. Chestnut Bros., 28 Ky. L. Rep. 404, 89 S. W. 298 (delay in delivering shipment of poultry); Louisville & Nashville Rd. Co. v. Wathen, 22 Ky. L. Rep. 82, 49 S. W. 185 (live stock); Spink v. Louisville & Nashville Rd. Co., 21 Ky. L. Rep. 778, 52 S. W. 1067 (when on contract for ejection of passenger).

Maryland: Western Maryland Rd. Co. v. Schawn, 97 Md. 563, 55 Atl. 701 (ejection of passenger).

Missouri: Moffatt Commission Co. v. Union Pacific Ry. Co., 113 Mo. App. 544, 88 S. W. 117 (when not liable for breach of contract; destruction of goods; delayed by floods); Gann v. Chicago Great Western Ry. Co., 72 Mo. App. 34 (contract to furnish cars).

Nebraska: Denman v. Chicago, Burlington & Quincy Rd. Co., 52 Neb. 140, 71 N. W. 967 (delay in transportation of cattle).

New York: Busch v. Interborough Rapid Transit Co., 96 N. Y. Supp. 747, 110 App. Div. 705, aff'd in 187 N. Y. 388, 80 N. E. 197 (action for breach of contract and not for assault and battery, though assault committed); Spencer v. Wabash Rd. Co., 55 N. Y. Supp. 948, 36 App. Div. 446 (failure to safely transport baggage; action on special contract).

⁵⁵ *Waters v. Mobile & Ohio Rd. Co.*, 74 Miss. 534, 21 So. 240.

When action ex delicto; carriers:

Alabama: Southern Ry. Co. v. Bunnell, 138 Ala. 247, 254, 36 So. 380 (ejection of passenger).

California: Gorman v. Southern Pacific Co., 97 Cal. 1, 31 Pac. 1112 (ejection of passenger).

District of Columbia: Chesapeake & Ohio Ry. Co. v. Patton, 23 App. D. C. 113 (injury to United States postal clerk. Examine *Martin v. Pittsburg & Lake Erie Rd. Co.*, 203 U. S. 284, 27 Sup. Ct. 100, 31 L. ed. 184, aff'g 72 Ohio St. 659).

Georgia: Seals v. Augusta Southern Rd. Co., 102 Ga. 817, 29 S. E. 116 (carrying passenger past station), 70 Ga. 368 (ejection of passenger).

waived by the owner and a suit brought against the trespasser on contract for rent or for use and occupancy.⁵⁶

Indiana: Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081 (personal injuries); Citizens' Street Rd. Co. of Indianapolis v. Willoeby, 134 Ind. 563, 564, 33 N. E. 627 (injury to passenger by conductor of street railway company throwing him off car); Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Call, 37 Ind. App. 232, 76 N. E. 816 (ejection by ticket agent); Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Street, 26 Ind. App. 224, 233, 237, 59 N. E. 404 (ejection of passenger); Parrill v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 23 Ind. App. 638, 55 N. E. 1026 (live stock); Chicago, St. Louis & Pittsburg Rd. Co. v. Graham, 3 Ind. App. 28, 29 N. E. 170 (not *ex contractu*; injuries; ejection of passenger).

Kansas: Atchison, Topeka & Santa Fe Rd. Co. v. Wilkinson, 55 Kan. 83, 39 Pac. 1043 (baggage of passenger injured by, accepted and retained by him); Atchison, Topeka & Santa Fe Rd. Co. v. Long, 5 Kan. App. 644, 47 Pac. 993 (ejection of passenger).

Massachusetts: Robinson v. Northampton St. Ry. Co., 157 Mass. 224, 32 N. E. 1 (failure of street car to stop; personal injuries).

Montana: Nelson v. Great Northern Ry. Co., 28 Mont. 297, 72 Pac. 642 (delay of live stock).

Nebraska: Fremont, Elkhorn & Missouri Valley Rd. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 1041, 4 L. R. A. (N. S.) 254 (not an action on contract nor an action at common law stated; personal injury).

New Jersey: Perine v. North Jersey Street Ry. Co., 69 N. J. L. 230, 54 Atl. 799 (ejection of passenger; not limited to action on contract but has one in tort).

New York: Eddy v. Syracuse Rapid Transit Ry. Co., 63 N. Y. Supp. 645, 50 App. Div. 109 (ejection of passenger).

Ohio: Pittsburg, Cincinnati & St. Louis Ry. Co., 55 Ohio St. 370, 13 Ohio Cir. Ct. R. 39, 45 N. E. 712, 60 Am. St. Rep. 706 (ejection of passenger); Toledo & Ohio Central Ry. Co. v. Marsh, 17 Ohio Cir. Ct. R. 379, 9 O. C. D. 548 (ejection of passenger).

South Carolina: Pickens v. South Carolina & Georgia Rd. Co., 54 S. C. 498, 32 S. E. 567 (failure to carry person to destination).

Texas: San Antonio & Arkansas Pass Ry. Co. v. Graves (Tex. Civ. App., 1899), 49 S. W. 1103 (delay in shipping goods); Marchand Central Ry. Co. v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778 (ejection of passenger).

Wisconsin: McKeon v. Chicago, Milwaukee & St. Paul Ry. Co., 94 Wis. 477, 69 N. W. 175, 35 L. R. A. 252, 59 Am. St. Rep. 910 (personal injuries and maltreatment of passenger occupying berth; failure to awaken and then hurrying out at station; miscarriage).

⁵⁶ Commonwealth Title Ins. & Trust Co. v. Dokko, 71 Minn. 533, 74 N. W. 891.

CHAPTER XIX

ACTIONS AT LAW CONTINUED—ACTIONS EX CONTRACTU

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| <p>§ 320. Action <i>Ex Contractu</i>—Contracts Express and Implied—Instances, Generally.</p> <p>321. Assumpsit.</p> <p>322. Assumpsit—Account Stated.</p> | <p>§ 323. Assumpsit By and Against Banks.</p> <p>324. Debt.</p> <p>325. Covenant.</p> <p>326. Book Account.</p> |
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§ 320. Action *Ex Contractu*—Contracts Express and Implied—Instances, Generally.¹

The rule is settled in Missouri that an action for damages on an attachment bond, though it requires the commission of a tort to constitute a breach of the contract, nevertheless is an action *ex contractu*, not *ex delicto*.² So an action to recover for the removal of timber from the mortgaged premises by the purchaser, pending disaffirmance of the mortgage sale and redemption thereunder, is *ex contractu* and not *ex delicto*.³ And where a company contracted to construct an electric light plant for a city in a workmanlike, safe and skillful manner, according to plans and specifications agreed upon by the defendant and the plaintiff; that in the erection of poles, stringing wires and placing arc lamps, it would use the best material and have perfect insulation in the transmission of the electric current; that each cross-arm should be provided with its full number of pins and insulators, whether required by the number of wires or not; and in consequence of a breach of such agreement the city had suffered damage by being compelled to pay for an in-

¹ See § 313, herein.

² *State ex rel. Hinde v. United States Fidelity & Guaranty Co.*, 135 Mo. App. 160, 115 S. W. 1081.

³ *Richardson v. McCreary & Co.*, 158 Ala. 65, 48 So. 341.

jury, and sues to recover from defendant the amount which it had been obligated to so pay, the action is one for breach of the company's contract and not an action sounding in tort for negligence for which the city was the sufferer.⁴

In a case in the Federal Supreme Court an agreement in writing between a mining company and a machinist stated that while in its employ he was seriously hurt under circumstances which he claimed, and it denied, made it liable to him in damages; that six months after the injury, both parties being desirous of settling his claim for damages, the company agreed to pay him regular wages and to furnish him with certain supplies while he was disabled, and carried out that agreement for six months, at the end of which, after he had resumed work, it was agreed that the company should give him such work as he could do, and pay him wages as before his injury, and this agreement was kept by both parties for a year; and then, in lieu of the previous agreements, a new agreement was made that his wages "from this date" should be a certain sum monthly, and he should receive certain supplies, and he on his part released the company from all liability for his injury, and agreed that this should be a full settlement of all his claims against the company. It was held that the last agreement was not terminable at the end of any month at the pleasure of the company, but bound it to pay him the wages stipulated, and to furnish him the supplies agreed as long as his disability to do full work continued; and that, if the company discharged him from its service without cause, he was entitled to elect to treat the contract as absolutely and finally broken by the company, and, in an action against it upon the contract, to introduce evidence of his age, health and expectancy of life, and, if his disability was permanent, to recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, deducting, however, any sum that he might have earned already or might thereafter earn, as well as the amount

⁴ *Owensboro, City of, v. Westinghouse, Church, Kerr & Co.* (U. S. C. C. A.), 165 Fed. 385, 91 C. C. A. 335.

of any loss that the defendant sustained by the loss of his services without its fault.⁵

In a New York case an action was brought to recover for moneys expended and services rendered by plaintiff at the alleged request of defendant, and for its use and benefit. Plaintiff was, without fault on his part, denied the claimed contract, although he was able and willing to perform it. In the action to recover for his services and expenses, it was held that by certain acts of the defendant's board of directors, the negotiations with the plaintiff might be deemed to have been recognized, and, in some sense, treated as having been made on behalf of defendant; that plaintiff had a right to assume that the persons with whom he negotiated legitimately represented defendant; that this, together with the fact that the moneys expended were for the benefit of defendant, justified a finding of an agreement between plaintiff and defendant that he should have the contract and that the services were rendered and expenses incurred at the request of defendant, and that such findings were sufficient to sustain a recovery.⁶

But in an Iowa case it appeared that the defendant corporation and an improvement company employed the same secretary and treasurer, though in no other wise connected. Plaintiff contracted with the improvement company, and a third person, to construct a tile drain on property belonging to the improvement company. Plaintiff also contracted with the defendant to construct a tile drain on its land, adjoining that of the improvement company. The bills were presented to the secretary of both companies, who, in payment thereof, gave a note signed by the improvement company, for the amount due for the construction of both drains. The order issued by the defendant corporation upon its contract with plaintiff, was indorsed by plaintiff, and surrendered to the secretary, as an

⁵ *Pierce v. Tenn. Coal, Iron & R. R. Co.*, 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. 335, 5 Am. Neg. Rep. 747, rev'g 81 Fed. 814, 52 U. S. App. 355, 26 C. C. A. 632, 8 Am. & Eng. R. Cas. (N. S.) 742.

⁶ *Wilson v. Kings County Elevated Rd. Co.*, 114 N. Y. 487, 24 N. Y. St. Rep. 81, 21 N. E. 1015.

officer of the improvement company, and was subsequently paid by the treasurer of the defendant to the improvement company. It appeared that in all these transactions the plaintiff supposed that there was but one company, the defendant, with which it was dealing; but it did not appear that there was any misrepresentation, deceit or fraud, on the part of the defendant, or its officers. It was held that a verdict for defendant was properly directed.⁷ Unless a check drawn upon a bank is accepted or the bank notified no action lies against the drawee.⁸

If a railway company abandons part of its line and ceases to maintain a piece of track which it had contracted to maintain, it has the right to do so, subject to the payment of damages for the violation of the contract; to be recovered, if necessary, in an action at law.⁹

§ 321. Assumpsit.¹⁰

Assumpsit may be maintained by a corporation.¹¹ And an action on assumpsit may also be maintained against a corporation aggregate founded upon its acts done within the lawful purposes for which it was organized.¹² So whenever a corpo-

⁷ *Seoville Plumbing Co. v. Highland Park Land Co.*, 99 Iowa, 303, 68 N. W. 684.

⁸ *State ex rel. St. Armand v. Bank of Commerce*, 49 La. Ann. 1060, 22 So. 207.

⁹ *Hoard v. Chesapeake & O. Ry.*, 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. 74.

¹⁰ See § 313, herein.

¹¹ *Beene v. Cahaba & Macon R. Co.*, 3 Ala. 660 (a corporation may maintain assumpsit upon a contract to take its stock at a specific price); *Metho-dist Episcopal Church v. Wood*, 5 Ohio (5 Ha.), 283, *Id.*, Wright, 12 ["no reasoning will be required of us, to prove, that one individual corporator may be made liable at law, to the corporation of which he is a member, in the same way that every other individual would be." *Id.*, 288 (side page 287) per Wright, J. A case of assumpsit for money had and received].

¹² *United States: Chesapeake & Ohio Canal Co. v. Knapp*, 34 U. S. (9 Pet.) 541, 9 L. ed. 222; *Bank of Columbia v. Patterson*, 11 U. S. (7 Cranch) 299, 3 L. ed. 351.

Maryland: Cape Sable Company's Case, 3 Bland (Md.), 606.

Massachusetts: Hayden v. Middlesex Turnpike, 10 Mass. 397, 6 Am. Dec. 143.

ration aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action lies. So upon a special contract, executed on the part of the plaintiff, *indebitatus assumpsit* will lie for the price.¹³ Assumpsit cannot, however, be sustained unless there is an express contract or the facts are such that the law will imply a contract.¹⁴ *Indebitatus assumpsit* lies for the recovery of dues which are owing to an association in accordance with its

Michigan: Hart Mfg. Co. v. Maim's Boudoir Car Co., 65 Mich. 564, 32 N. W. 820 (assumpsit was brought, but the only question was to whom were the goods sold and credit given).

New Jersey: Antopoeda Baptist Church, Trustees of, v. Mulford, 8 N. J. L. 182.

New York: Dunn v. Rector, etc., of St. Andrew's Church, 14 Johns. (N. Y.) 118; Danforth v. Scholarie Turnpike Co., 12 Johns. (N. Y.) 227.

Pennsylvania: Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 16, 8 Am. Dec. 675, per Gibson, J., relying upon the language of Judge Story in Bank of Columbia v. Patterson, 7 Cranch (11 U. S.), 299; Overseers of Poor of North Whitehall Twp. v. Overseers of Poor of South Whitehall Twp., 3 Serg. & R. (Pa.) 117.

South Carolina: Waring v. Catawba Co., 2 Bay (S. C.), 109 (assumpsit for goods sold and for work and labor, etc.).

Texas: San Antonio, City of, v. Lewis, 9 Tex. 69 (all parol contracts made by the authorized agents of a corporation, within the scope of the legitimate purposes of its institution are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied premises for the enforcement of which an action will lie).

Vermont: Proctor v. Webler, 1 D. Chip. (Vt.) 371; *Id.*, 456, note; Poultney v. Wills, 1 Aiken (Vt.), 180 (for money had and received lies against a corporation, same as against an individual).

¹³ Bank of Columbia v. Patterson, 7 Cranch (11 U. S.), 299, 3 L. ed. 351.

¹⁴ Reilly v. Crown Petroleum Co., 213 Pa. St. 595, 63 Atl. 253. The court, per Mestresat, J., said: "It is therefore clear that assumpsit will not lie. This action cannot be sustained unless there was an express contract or the law will imply a contract; Bethlehem Borough v. Perseverance Fire Co., 81 Pa. St. 445; McClosky v. Miller, 72 Pa. St. 151. Here, it is admitted, there was no contractual relation between the parties. It is also clear that the facts attending the possession of the premises and the taking of the oil by the defendant company are not such that the law will imply a contract on the part of the defendant company to pay for the oil which it took. On the

by-laws.¹⁵ So a corporation may be liable in assumpsit for work and labor done.¹⁶ So a turnpike corporation may be sued for work and labor performed and materials furnished.¹⁷ A party to a contract can also sue on a *quantum meruit* for the value of services performed or can bring an action on the contract for damages where the wrongful act of the other party to said contract has prevented its full performance.¹⁸ And where the defendant has prevented the completion of work for which the plaintiff had transported labor and material to perform and was not in default, an action *quantum meruit* may be maintained.¹⁹ An original action may be maintained against a corporation, public or private, upon a claim which its proper auditing board has refused to allow in whole or in part, unless the statute has provided or directed other proceedings to enforce it.²⁰ Where the consideration of a contract for the sale and conveyance of land has wholly failed, assumpsit is the appropriate action to recover back money paid under the contract, although the contract be under seal.²¹ But a plaintiff who by ejectment has recovered possession of land cannot maintain an action of assumpsit for the value of oil mined upon the land by the defendant while in possession.²² And a corporation can

contrary, the facts repel any inference of an agreement on the part of the defendant company to pay for the oil taken by it, and conclusively show that the defendant company had the actual adverse possession of the land for oil purposes during the time the oil was taken from it. Under such circumstances, the law will not imply a contract by the occupant to pay for the profits of the land taken during his adverse possession of the property."

¹⁵ Elm City Club v. Howes, 92 Me. 211, 42 Atl. 392.

¹⁶ Underwood v. Newport Lyceum, 1 Fla. 129, 41 Am. Dec. 260.

¹⁷ Dunningtons v. Pres. & Dir. N. W. Turnpike Road, 6 Gratt. (Va.) 160.

¹⁸ Welston Coal Co. v. Franklin Paper Co., 57 Ohio St. 182, 39 Ohio L. J. 16, 48 N. E. 888.

¹⁹ Southern Pacific Co. v. American Well Works, 172 Ill. 9, 49 N. E. 575, aff'g 67 Ill. App. 512.

²⁰ Willow Springs Irrigation Dist. v. Wilson, 74 Neb. 269, 104 N. W. 165, a case of an action by a civil engineer to recover from the corporation the value of services rendered under a written contract.

²¹ Newberry Land Co. v. Newberry, 95 Va. 111, 3 Va. Law Reg. 584, 27 N. E. 899.

²² Reilly v. Crown Petroleum Co., 213 Pa. St. 595, 63 Atl. 253. The court, per Mestrezat, J., said: "This question is settled alike by reason and au-

not sue to recover money paid by others upon a contract, the consideration whereof has wholly failed, where it appears that at the time of the contract the corporation was not in existence, the money was not paid by or for it, or for any of its liabilities, and the contract was not made for its benefit, but wholly for the benefit of the parties to the contract, and there has been no subsequent assignment to it, or acceptance by it, of the benefit of the contract.²³ Where a contract is *ultra vires*, and a corporation has received money under it which in equity and good conscience belongs to another and which it ought to pay over, it is liable for it in an action for money had and received, with interest after demand.²⁴ Where a building and loan as-

thority. A plaintiff cannot maintain an action of ejectment when he is in possession of the premises. In bringing the action of ejectment, therefore, the plaintiffs admitted the defendant in possession of the land at least for the purpose of mining and producing oil and removing it from the premises. The action resulted in a judgment ousting the defendant company from the possession for oil purposes which must be regarded as having been held adversely to the plaintiffs. During the time defendant company held possession, it drilled the well and took the oil for which this action was brought. It is the profits or proceeds of the land taken by the defendant during its adverse holding of the premises which the plaintiffs have the right to recover. * * * It is well settled by a long line of decisions of this court that after a recovery in ejectment, trespass is the proper remedy to recover mesne profits of land taken by an adverse claimant in possession of the premises."

²³ *Newberry Land Co. v. Newberry*, 95 Va. 111, 3 Va. Law Reg. 584, 27 S. E. 899.

²⁴ *Leigh v. American Brake-Beam Co.*, 205 Ill. 147, 68 N. E. 713. The court, per Cartwright, J. (at p. 152), after discussing the *ultra vires* nature of the contract and stating the law concerning such contracts, said: "That rule of law, however, does not prevent a recovery from the defendant of the moneys of the plaintiff received by him. Although a party is not liable to pay according to a contract which is *ultra vires*, that fact is not permitted to work injustice where the law can afford a remedy without enforcing the illegal contract, and the courts will give relief where it can be given independently of the contract. It would be unjust to hold that one who has received money or property under a contract which is *ultra vires* need not account for it because the contract was illegal, but the law implies a contract to return what has been received. Where a contract is not *malum in se* or *malum prohibitum*, and it has been executed or benefits have been received, the party benefited, whether the corporation or individual, will not be permitted to retain the fruits of the transaction without compensation."

sociation refuses to pay stockholders the withdrawal value of shares of stock assumpsit may properly be brought to recover such value.²⁵ An action by a municipal corporation to recover from a street railroad company the cost of maintaining pavements in a street, which the company is by its charter bound to maintain, is an action in assumpsit.²⁶

§ 322. Assumpsit—Account Stated.²⁷

A certificate of a road master, who is authorized to issue it that the bearer is entitled to a specific sum for labor performed and its acceptance by the laborer, constitute an account stated on which an action may be maintained by the laborer, or his assignee, against the railroad company, as upon an implied promise to pay it, without reference to the items of the original account.²⁸

§ 323. Assumpsit By and Against Banks.²⁹

Assumpsit may be maintained by a national bank. Thus where a national bank has unlawfully paid out money for its own stock it may maintain an action of assumpsit to recover back the same; nor is it necessary in such a case to offer to return the stock or to resort to equity.³⁰ But a voluntary payment, with knowledge of the facts, under a mistake as to the law, cannot be recovered back. So where a bank charged a customer's account with the amount of a matured note indorsed by him and protested for nonpayment, and subsequently, with full knowledge of the facts, repaid the amount, no action will lie by the bank for the recovery of the amount so paid.³¹ Again, where one who is a stranger to a draft or bill of

²⁵ *Prairie State Loan & B. Assoc. v. Gorrie*, 167 Ill. 414, 47 N. E. 739, aff'g 64 Ill. App. 325.

²⁶ *Metropolitan Rd. Co. v. District of Columbia*, 132 U. S. 1, 33 L. ed. 23, 10 Sup. Ct. 19.

²⁷ See § 313, herein.

²⁸ *St. Louis, Iron Mountain & Southern Ry. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. 704.

²⁹ See § 313, herein.

³⁰ *Burrows v. Niblack* (U. S. C. C. A.), 84 Fed. 111, 53 U. S. App. 712, 28 C. C. A. 130.

³¹ *First National Bank of Winston v. Taylor*, 122 N. C. 569, 29 S. E. 831.

exchange goes to a bank with the payee named therein for the purpose of identifying him, and upon the payee asking to have the draft or bill of exchange cashed after having indorsed it, such person, at the instance of the cashier of the bank, indorses the paper, upon its being ascertained that such draft or bill of exchange had been altered and the amount raised by the payee, with which fraud the accommodation indorser had no complicity, the liability arising from such indorsement, if any, is strictly that of an indorser, and an action for money had and received cannot be maintained against such indorser; and the fact that after receiving the money the payee in the draft or bill of exchange paid to such indorser a part of the money in satisfaction of a debt which he owed him, and which the indorser at once discharged and surrendered the securities held by him, does not render the indorser liable to the bank in an action for money had and received, or for money paid, to the extent of the amount of the money received by him from the payee.³² Notwithstanding a want of privity between the plaintiff and a bank the latter may be sued in assumpsit for money had and received where the plaintiff's money which has been remitted to it by mistake is credited upon an indebtedness held by the husband of the plaintiff.³³ And although a contract made by a corporation may be illegal as *ultra vires*, an implied contract may exist compelling it to account for the benefits actually received. So a national bank which guarantees a loan made by another bank in pursuance of an agreement that it be paid the amount due it by the borrower out of the proceeds of the loan, cannot avoid its liability on the guaranty as to the amount actually received by it pursuant to the arrangement

³² *Alabama National Bank v. Rivers*, 116 Ala. 1, 22 So. 580. "This was an action of assumpsit by a national bank against the appellee to enforce the latter's liability as an accommodation indorser of a cheque or draft, which had been purchased from the apparent payee upon the appellee's indorsement and which had been raised from two dollars to two thousand dollars between the date of its issuance and the purchase by appellant," per Brickell, C. J.

³³ *First National Bank v. Gatton*, 172 Ill. 625, 50 N. E. 121, aff'g 71 Ill. App. 323.

on the ground of *ultra vires*; it is liable for money had and received.³⁴

Again, when a bank receives a deposit and unconditionally places the same to the general credit of the depositor, it becomes liable upon an implied contract to pay his checks drawn thereon when presented, and it is against the general policy of the law to permit such bank, in an action by the depositor to recover money thus voluntarily placed to his credit, to claim to be the owner thereof.³⁵

In a case of assumpsit by a depositor against a bank it appeared that a national bank voluntarily acting as the agent of one of its depositors in the sale of certain securities sent the securities to a broker in a distant city, who sold them and sent a check to the bank for the proceeds of the sale. The bank observed due diligence in forwarding the check for collection, but before it could reach the bank upon which it was drawn, the broker made an assignment and the check proved worthless. When the bank first received the check it credited the amount of it to the depositor's account and permitted him to draw it out. Subsequently, upon the check being returned as worthless, the bank charged off from the depositor's account the amount previously credited to him. It was held that the bank had no right to charge back the credit, and it could not relieve itself, by so doing, for liability for the amount thereof, to the depositor.³⁶ In an action of assumpsit to recover the value of certain gold coin deposited in a bank for safe-keeping the gold was fraudulently taken out by the cashier of the bank it was held that the bank was not liable to the depositor for the value of the gold.³⁷ Two incorporated companies may unite in an action of assumpsit to recover a sum of money deposited in a bank in their joint names.³⁸

³⁴ Citizens' Cent. Nat. Bank of New York v. Appleton, 216 U. S. 196, 54 L. ed. —, 30 Sup. Ct. —, aff'g 190 N. Y. 417.

³⁵ Martin v. Minnekahta State Bank, 7 S. D. 263, 64 N. W. 127.

³⁶ Pepperday v. Citizens' National Bank, 183 Pa. St. 519, 28 Pitts. L. J. (N. S.) 245, 41 Wkly. N. C. 343, 38 Atl. 1030, 39 L. R. A. 529.

³⁷ Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

³⁸ New York & Sharon Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412.

In an action of assumpsit against a bank, on a contract under the seals of the president and cashier, it was held that the action was well brought; it makes no difference, in an action of assumpsit against a corporation, whether the agent was appointed under the seal or not; nor whether he puts his own seal to a contract which he makes in behalf of the corporation.³⁹

§ 324. Debt.⁴⁰

In the case of an action for debt against an insurance company to recover a penalty under a statute to prevent unjust discrimination between insurants of the same class, and by life insurance companies, the company will be held chargeable with violation of the law by its agent acting within the scope of his authority, and it is immaterial whether the board of directors or any of its officers having general authority knew of such violation or intended violation, connived at, participated in, or ratified or approved it.⁴¹

§ 325. Covenant.⁴²

Where an action of covenant was brought it was held that one not a party to a deed *inter partes*, nor a privy to such party, and not named nor definitely pointed out in it as the beneficiary could not sue thereon either at common law nor under a statute providing that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which it might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise."⁴³ Upon covenant of the defendant, made with another corporation "to pay all outstanding debts and liabilities" of the latter corporation, assumpsit will not lie against the defendant by cred-

³⁹ Bank of Metropolis v. Guttschlick, 14 Pet. (39 U. S.) 19, 10 L. ed. 335.

⁴⁰ See § 313, herein.

⁴¹ Franklin Life Ins. Co. v. People, 200 Ill. 619, 66 N. E. 379, aff'g 103 Ill. App. 554.

⁴² See § 313, herein.

⁴³ Newberry Land Co. v. Newberry, 95 Va. 119, 3 Va. Law Reg. 597, 27 S. E. 897.

itors of the other corporation, whose debts were outstanding at the time the covenant was made. The beneficiaries' remedy is in equity.⁴⁴ An action of covenant is not the proper remedy against a corporation which has not executed its deed under seal.⁴⁵

A covenant against incumbrances runs with the land, and, where a mortgage contains such a covenant, an action upon it may be maintained by a purchaser at a foreclosure sale under the mortgage.⁴⁶

§ 326. **Book Account.**⁴⁷

A corporation may maintain an action of book account. Money received to be accounted for, and for which party becomes debtor upon receipt of the same, may be recovered in that form of action.⁴⁸

⁴⁴ *Harvey v. Maine Condensed Milk Co.*, 92 Me. 115, 42 Atl. 342.

⁴⁵ *Mitchell v. St. Andrews Bay Land Co.*, 4 Fla. 200.

⁴⁶ *Security Bank of Minnesota v. Holmes*, 68 Minn. 538, 71 N. W. 699.

⁴⁷ See § 313, herein.

⁴⁸ *Vermont Mutual Fire Ins. Co. v. Cummings*, 11 Vt. 503.

CHAPTER XX

ACTIONS AT LAW CONTINUED—ACTIONS EX DELICTO

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| § 327. Actions <i>Ex Delicto</i> , Generally. | § 334. Nuisance. |
| 328. Trespass. | 335. Libel and Slander. |
| 329. Trespass for Mesne Profits. | 336. Malicious Prosecution. |
| 330. Trespass <i>Quare Clausum Fregit</i> . | 337. Wrongfully Suing Out Attachment. |
| 331. False Imprisonment. | 338. Conspiracy—Instances. |
| 332. Trespass on the Case. | 339. Fraud and Deceit—Instances. |
| 333. When Action on Case Lies Concurrently With Assumpsit. | 340. Trover and Conversion. |
| | 341. Replevin—Claim and Delivery. |

§ 327. Actions *Ex Delicto*, Generally.¹

It is settled that corporations may be charged in actions *ex delicto* as well as *ex contractu*.² So one may by contract acquire an opportunity for acts and conduct in which third parties other than those with whom he contracts are interested and for negligence in which he is liable to such other parties. Thus while a citizen may have no individual claim against a company contracting to supply water to a city for its failure to do anything under the contract, he may have a claim against it, after it has entered upon a contract and is engaged in supplying the city with water, for damages resulting from negligence, and in such a case the action is not for breach of contract but for a tort.³ A cause of action *ex delicto* and not *ex contractu* is stated where, in a suit against a railroad company the plaintiff alleges the purchase and possession of a mileage ticket, the possession of a freight train permit, and that defendant disregarding its duties

¹ See §§ 313, 317, herein.

² *McKim v. Odom*, 3 Bland's Ch. (Md.) 421, per Bland, Ch.

³ *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. 180.

as a common carrier of passengers, wrongfully ejected him from a caboose attached to one of its freight trains but did not allege any contract to carry him as a passenger or any breach thereof.⁴ So an action against a railroad company for damage to hogs shipped by plaintiff, which damage is alleged to have been caused by the negligent delay in their shipment by the defendant, is an action in tort and not an action on a contract.⁵

§ 328. Trespass.⁶

An action of trespass may be maintained against a corporation.⁷ So trespass *vi et armis* will lie against a corporation for breaking, entering and carrying away personal property;⁸ but it is not the proper form of action for injuries, resulting from the negligence of the servants of a corporation; trespass on the case, is the proper action.⁹

In an action, however, against a railway company to recover damages for personal injuries alleged to have been sustained by the plaintiff by reason of his being run over by one of defendant's locomotives drawing a train, a count of the complaint which, in stating the negligence complained of, avers "that defendant wantonly or intentionally caused said engine or train to run upon or against plaintiff," or a count which avers that "defendant, through its servant or agent in charge or control of said train, wantonly or intentionally inflicted upon plaintiff injuries and damages * * * by wantonly or intentionally causing or allowing said train to run upon or against plaintiff," states a cause of action in trespass, and not in case;

⁴ Reed v. Chicago, Burlington & Quincy Rd. Co., 84 Neb. 8, 120 N. W. 442.

⁵ Brown v. St. Louis & San Francisco Ry. Co., 135 Mo. App. 624, 117 S. W. 112.

⁶ See §§ 313, 317, herein.

⁷ Underwood v. Newport Lyceum, 1 Fla. 129, 41 Am. Dec. 260; Crawfordsville & Wabash Rd. Co., President and Directors of, v. Wright, 5 Ind. 252. "The company contend that the suit cannot be maintained, because trespass will not lie against a corporation. Such was once supposed to be the law; but the doctrine was unsound and has been exploded." Brokaw v. New Jersey Rd. & Transp. Co., 32 N. J. L. 328, 90 Am. Dec. 659.

⁸ Edwards v. Union Bank of Florida, 1 Fla. 136.

⁹ Illinois Cent. Ry. Co. v. Reedy, 17 Ill. 580. See § 317, herein.

and in order to sustain such counts of the complaint, the plaintiff must prove actual participation on the part of the defendant in the damnifying act.¹⁰

A pipe line company engaged in the production and transportation of natural gas, which has buried its pipe under the provisions of a statute,¹¹ is under no obligation to let it remain indefinitely, but it has a right to abandon the easement which is acquired under the right of eminent domain and remove the pipe when its interests require it. And where a pipe line company removes pipe which it has buried under the land of another, by proceedings under the statute,¹² it is the duty of the company to remove the pipes at the time and in the manner least harmful to the landowner; to fill the trench so as substantially to restore the surface of the land, and to make compensation for any actual injury to growing grain or grass, and for any substantial injury to the turf, beyond the mere opening and filling of the trench in which the pipe lay.¹³ Again, an action of trespass, for assault and battery, will lie against a corporation.¹⁴

§ 329. Trespass for Mesne Profits.¹⁵

Trespass for mesne profits may be maintained against a corporation;¹⁶ and it is the appropriate remedy to recover the value of oil mined upon the land of the defendant while in possession.¹⁷

¹⁰ *Central of Georgia Ry. Co. v. Freeman*, 140 Ala. 581, 37 So. 387.

¹¹ Act May 29, 1885, P. L. Pa. 29.

¹² Act May 29, 1885, P. L. Pa. 29.

¹³ *Clements v. Philadelphia Co.*, 184 Pa. St. 28, 39 L. R. A. 532, 41 Wkly. N. C. 321, 38 Atl. 1090, 28 Pitts. L. J. U. S. 344. A case of trespass for damages alleged to have been caused to plaintiff's property in the removal of its pipe.

¹⁴ *St. Louis, Alton & Chicago Ry. Co. v. Dalby*, 19 Ill. 353. If the act of a servant is unlawful in itself, trespass will lie. See § 317, herein. *Brokaw v. New Jersey Rd. & Transp. Co.*, 32 N. J. L. 328, 90 Am. Dec. 659. Compare *Orr v. Bank of United States*, 1 Ham. (1 Ohio) 28, 13 Am. Dec. 588. See § 317, herein.

¹⁵ See §§ 313, 317, herein.

¹⁶ *M'Cready v. Thomas*, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

¹⁷ *Reilly v. Crown Petroleum Co.*, 213 Pa. St. 595, 63 Atl. 253.

§ 330. **Trespass Quare Clausum Fregit.**¹⁸

A corporation may maintain an action of trespass *quare clausum fregit*.¹⁹ Such an action can be maintained against a railroad company or other private corporation.²⁰ It will also lie against a railroad corporation for entering upon plaintiff's land for the purpose of constructing a railroad.²¹ So trespass will lie against a railroad company for entering upon the plaintiff's close with men, etc., and digging up and carrying away earth, etc., and where the record of such a cause does not show that the injuries were committed by the company when acting under their charter or in the construction of their road it cannot be presumed that they were so committed; such a defense in order to be availed of must be set up by plea.²² Again, a complaint, alleging that the defendant unlawfully and with force broke and entered on plaintiff's lands and cut down and carried away trees and timber and converted and disposed of the same to his own use, states a cause of action for trespass, and not in trover, and in the absence of all proof connecting him with cutting the timber or entry on the land, a nonsuit should be granted.²³

One who buries his dead in soil to which he has a freehold right, and to the possession of which he is entitled, can maintain an action of trespass *quare clausum fregit* against anyone who digs or disturbs the grave. And one who buries his dead in a public cemetery, by the express or implied consent of those in proper control of it, though not the owner of the soil by deed

¹⁸ See §§ 313, 317, herein.

¹⁹ *Greenville & Columbia Rd. Co. v. Pastlow*, 14 Rich. Law (S. C.), 237, action of trespass *quare clausum fregit* to recover damages for injuries done to plaintiff's road.

When trespass *quare clausum fregit* will not lie, see *Foote v. City of Cincinnati*, 9 Ohio (9 Ham.), 31, 34 Am. Dec. 420.

²⁰ *Main v. Northeastern Rd. Co.*, 12 Rich. Law (S. C.), 82, 75 Am. Dec. 725.

²¹ *Whiteman v. Wilmington & Susquehanna Rd. Co.*, 2 Harr. (Del.) 514, 33 Am. Dec. 411.

²² *Crawfordsville & Wabash Rd. Co., President & Directors of, v. Wright*, 5 Ind. 252.

²³ *Dessert Lumber Co. v. Wadleigh*, 103 Wis. 318, 79 N. W. 237.

properly executed, acquires such a possession of the lot where the bodies are buried as will entitle him to maintain an action of trespass *quare clausum fregit* against the owners of the fee, or strangers who, without his consent, negligently or wantonly disturb the graves or remains; but this exclusive right of possession of land to make interments in the particular lot is limited to the time during which the ground constituting the cemetery continues to be used for burial purposes, and upon its ceasing to be so used his only right is that he should have due notice and an opportunity to remove the bodies to some other place of his own selection, if he so desire, or, on failing to do so, that the remains should be decently removed by others. So in an action of trespass *quare clausum fregit* it is not necessary that the complaint should describe the premises trespassed upon with definite particularity; it is sufficient if the description gives the defendant such information as will prevent him from being misled or from being uncertain as to the particular premises or close alleged to have been broken or trespassed upon.²⁴

§ 331. False Imprisonment.²⁵

An action for trespass for false imprisonment may be maintained against a corporation.²⁶ A railroad company is not liable for the unauthorized act of one of its employes in causing the arrest of a passenger.²⁷ A telephone and telegraph company is liable in an action for damages for false imprisonment where it, by its servant, caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect its poles on his land. In such a case the jury may, in addition to compensatory damages, award exemplary, punitive or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly or with criminal indifference to civil obligations, or has been guilty of an

²⁴ *Beesemer Land & Improvement Co. v. Jenkins*, 111 Ala. 135, 18 So. 565.

²⁵ See §§ 313, 317, herein.

²⁶ *Owsley v. Montgomery & West Point Rd. Co.*, 37 Ala. 568 (averments stated).

²⁷ *St. Louis & San Francisco Rd. Co. v. Wyatt*, 84 Ark. 193, 105 S. W. 72. See § 317, herein.

intentional and willful violation of the plaintiff's rights. An action for damages lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause and is valid in form, and the proceeding thereon was justified and proper in its inception, but the injury arises in consequence of abuse in subsequent proceedings.²⁸

§ 332. Trespass on the Case.²⁹

Trespass on the case will lie against a corporation for a tort.³⁰ So it is settled that trespass on the case will lie against a corporation for neglect of a corporate duty by which the plaintiff suffers.³¹ And if a servant does a lawful act in an unlawful way, case is the proper remedy.³² So case may be sustained against a corporation aggregate to recover for injuries occasioned by a want of ordinary care and foresight.³³ Case for malfeasance also lies against a corporation for negligently and unskillfully constructing public works.³⁴ An action on the case is also an appropriate remedy for personal injuries sustained by the plaintiff as a passenger in railroad cars caused by the wrongful acts of a servant of the corporation, even though such acts have been acts of force, and such that trespass would have been the only proper remedy against the servant.³⁵ And a complaint which alleges that plaintiff's intestate was rightfully at work in defendant's mine as an employé of defendant's independent contractor, and while so engaged was struck by defendant's tram cars and killed through the negligence of defendant's servants, etc., states a good cause of action; and is in case and not in trespass.³⁶ Again, an action on the case for vexatious

²⁸ *Jackson v. American Teleph. & Teleg. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

²⁹ See §§ 313, 317, herein.

³⁰ *Chestnut Hill & Spring House Turnp. Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675.

³¹ *Riddle v. Proprietors*, 7 Mass. 169, 5 Am. Dec. 35.

³² *St. Louis, Alton & Chicago Rd. Co. v. Dalby*, 19 Ill. 353. See § 317, herein.

³³ *Brown v. South Kennebec Agricultural Soc.*, 47 Me. 275.

³⁴ *Mayor of New York v. Bailey*, 2 Denio (N. Y.), 433.

³⁵ *Havens v. Hartford & New Haven Rd. Co.*, 28 Conn. 69.

³⁶ *Lookout Mountain Iron Co. v. Lea*, 144 Ala. 169, 39 So. 1017.

suit may be maintained against a corporation aggregate.³⁷ So case for damages for negligence which is essentially an action *ex delicto* is the remedy for injury sustained by the rifling of the contents of a trunk which plaintiff, intending to become a passenger on defendant's train, sent to its station and the trunk was so negligently and carelessly kept that it was so rifled before plaintiff's arrival to pay her fare and take her journey.³⁸ And trespass does not lie against a railroad corporation to recover damages against it for the loss or injury of animals run over by its engines or cars; case is the proper remedy.³⁹ Trespass on the case also lies against a corporation aggregate for a tort for stopping a water course;⁴⁰ and for tort, for damages for having so negligently built and maintained a bridge as to cause damage by preventing easy and safe navigation.⁴¹ Again, case and not trespass *quare clausum fregit* is the proper form of action for diminution of the value of adjacent property by reason of the construction of a railroad in the public streets.⁴² So case and not trespass is the proper remedy where a railroad corporation causes an injury to land by its neglect in removing stones

³⁷ *Goodspeed v. East Haddam Bk.*, 22 Conn. 530, 58 Am. Dec. 439, action was against an incorporated bank alleging that defendants without probable cause, and with malicious intent, unjustly to vex, harass, embarrass and trouble the plaintiff, commenced by writ of attachment, and prosecuted against him a vexatious suit.

³⁸ *Corry v. Pennsylvania Rd. Co.*, 194 Pa. St. 516, 45 Atl. 341. Pennsylvania Statute, Act May 25, 1887, only assumes to group together into an action of assumpsit those demands arising *ex contractu* which were theretofore "recoverable in debt, assumpsit or covenant," and all actions of trespass, trover and trespass on the case into one action, "to be called an action of trespass."

³⁹ *Selma, Rome & Dalton Rd. Co. v. Webb*, 49 Ala. 240. The defendant demurred to the complaint on the ground that the proper remedy was case not trespass.

⁴⁰ *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6.

⁴¹ *Town of Harlem v. Emmert*, 41 Ill. 319.

⁴² *Jeffersonville, Madison & Indianapolis Rd. Co. v. Esterle*, 13 Bush (76 Ky.), 667. "By the rules of the common law, trespass *quare clausum fregit* could not be maintained, except by a person having the actual possession of the *locus in quo*, and even by our statutory modifications of those rules, the party complaining must at least have legal seizin." *Id.*, 672, per Lindsay, C. J.

therefrom even though thrown thereon by blasting in a proper manner during its operations in constructing its railroad.⁴³ And case and not assumpsit is the appropriate remedy in an action to recover for the value of property stored in a freight car by a railroad company whether the recovery is sought against them as carriers or as warehousemen or under a statute.⁴⁴ A special action on the case gives an adequate remedy to recover the value of stock where an incorporated bank unduly refuses to transfer such stock.⁴⁵

§ 333. When Action on Case Lies Concurrently With Assumpsit.⁴⁶

Case will lie concurrently with assumpsit for a breach of duty arising out of an express or implied contract. And in many cases where assumpsit is a concurrent remedy, case will also lie for a violation of the duty which the contractual relations of the parties involve. So although assumpsit will usually lie for breach of a contract, yet an action on the case for a breach of the common-law duty is oftener the better remedy. In an action on the case brought by the plaintiff town against the defendant corporation to recover the value of the town-hall and certain sidewalks and hose, the property of the town, which were destroyed by fire by reason of the alleged negligence of the defendant corporation in failing to perform its contract to supply through its pipes water of sufficient current, pressure and volume to extinguish fires within the range of its hydrants, it appeared among other things, from the allegations in the plaintiff's declaration that the defendant corporation entered into a contract with the plaintiff town whereby for the sum of eight hundred dollars per year, it agreed to supply the plaintiff town with sixteen post hydrants and water for the same before the first day of August, 1902; that it also agreed that said hydrants should have two nozzles and should be

⁴³ *Sabin v. Vermont Central Rd. Co.*, 25 Vt. 363.

⁴⁴ *Welch v. Concord Railroad*, 68 N. H. 206, 44 Atl. 304.

⁴⁵ *Shipley, Matter of, v. Mechanics' Bank*, 10 Johns. (N. Y.) 484.

⁴⁶ See §§ 313, 317, herein.

supplied with pipes at least four inches in diameter; that it also agreed that said hydrants should be so placed that proper protection against fire should be secured; that it also agreed that the waterworks should be supplied by a pump or pumps of a capacity not less than one million gallons per day; also that the defendant corporation engaged and became bound and obliged to furnish through its pipes and hydrants water of sufficient current, pressure and volume to extinguish fire within range of such hydrants, and especially and particularly fires originating in or communicated to the aforesaid building and property of the plaintiff town. Upon demurrer set up to the declaration, with the right to plead anew, it was held: (1) That upon proof of the facts stated in the declaration the defendant corporation would be liable to the plaintiff town in an appropriate action for the damages caused by its negligence in failing to perform a duty arising from its contractual relations with the plaintiff town; (2) That the plaintiff town was legally entitled to bring an action on the case to recover damages for the consequential injuries resulting from the negligent manner in which the defendant corporation performed a duty created by its express contract with the plaintiff town. With respect to the issue presented in the aforesaid actions for negligence, the defendant corporation was required to use ordinary care to maintain pipes and furnish water of the pressure and volume stipulated in its written contract. It was only required to exercise such prudence, vigilance and precaution as would meet the requirements of ordinary care according to the exigencies of the situation, having due regard to the nature and importance of the contract, the rights and interests of those to be affected by it and the manifest consequences of a failure to perform it.⁴⁷

§ 334. Nuisance.⁴⁸

In an action at law, damages may be recovered against a person who maintains a nuisance which renders the ordinary

⁴⁷ *Milford v. Bangor Railway & Electric Co.*, 104 Me. 233, 71 Atl. 759.

⁴⁸ See §§ 313, 317, herein.

use and occupation of property physically uncomfortable to its owner, and if the cause of the annoyance and discomfort be continuous, equity will restrain it. And corporations are equally responsible with individuals to respond in damages for injuries caused by nuisances maintained by their servants by the authority of the corporation.⁴⁹ And while a corporation has the right to locate and operate its electric light plant on its own property yet in doing so it cannot act arbitrarily and without reference to damage to property in the immediate vicinity of such plant.⁵⁰ Where a railroad embankment was one of the causes of backwater upon plaintiff's land and amounted to a nuisance, knowledge of the fact that it was a nuisance or an obstruction should have been brought home to the party charged with maintaining the same, where the railroad and embankment were built by his grantor, before such grantee can be held liable for such maintenance.⁵¹ Again, in an action of trespass to recover damages for flooding land by a water company, it was alleged that the plaintiff's business was destroyed and his power to use his property ended; and it was held that if the nuisance was permanent and continuing and the owner elected to so consider it he could recover in the same action both past and present damages.⁵²

An allegation in a declaration that the defendant "negligently" allowed noxious fumes to escape from its factory to the

⁴⁹ *Baltimore & Potomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. ed. 739. *Examine Savannah, F. & W. Ry. Co. v. Parish*, 117 Ga. 893, 45 S. E. 280.

As to remedies generally in case of nuisances, see *Joyce on Nuisances*, §§ 359-505.

⁵⁰ *Sherman Gas & Electric Co. v. Belden* (Tex. Civ. App., 1909), 115 S. W. 896. There was evidence in this case that the north wall of the power house was less than fifteen feet from plaintiff's residence; that the plant was operated twenty-four hours each day; that the explosion of oil in the engines could be heard all night; that it caused the windows to rattle and the house to jar, making it impossible for the appellees to sleep and enjoy their house. A judgment below for the plaintiffs was affirmed.

⁵¹ *Nicket v. St. Louis, Memphis & Southern Rd. Co.*, 135 Mo. App. 661, 116 S. W. 477.

⁵² *Woodstock Hardwood & Spool Mfg. Co. v. Charlestown Light & Water Co.* (S. C., 1909), 63 S. E. 548.

damage of plaintiff's crops, does not require of plaintiff specific proof of the precise negligence which caused or permitted such fumes to escape; for, from proof of the escape of noxious fumes and consequent damage therefrom, negligence will be inferred. The operation of a factory in such manner as to constitute a nuisance may be given in evidence under an allegation that it was "negligently" operated, provided the other allegations of fact make out a case of nuisance and are supported by the proof.⁵³

Under a State statute⁵⁴ authorizing one to sue for the benefit of all where the question is one of "common or general interest of many persons," two or more owners in severalty of abutting lots similarly situated may join as plaintiffs in an action to prevent the laying of a street railway, about to be laid upon a street without authority of law, on the ground that it will be a continuing nuisance to the owners of abutting lots, but one cannot sue for the benefit of all; and a statement in the complaint that he does so sue is mere surplusage.⁵⁵

§ 335. Libel and Slander.⁵⁶

An action for libel can be maintained against a corporation.⁵⁷ So a corporation aggregate may compose and publish a libel

⁵³ *Hinmon v. Somers Brick Co.*, 75 N. J. L. 889, 70 Atl. 166.

⁵⁴ Wis. Stat., 1898, § 2604.

⁵⁵ *Linden Land Co. v. Milwaukee Electric Ry. & Light Co.*, 107 Wis. 493, 83 N. W. 851.

⁵⁶ See § 313, herein.

⁵⁷ *United States: Philadelphia, Wilmington & Balt. Rd. Co. v. Quigley*, 21 How. (62 U. S.) 202, 16 L. ed. 73.

Michigan: Bacon v. Michigan Cent. Rd. Co., 55 Mich. 224, 21 N. W. 324, 54 Am. St. Rep. 372 (well settled in this State; grounds stated on which contrary doctrine based, *Id.*, 228).

Minnesota: Aldrich v. Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84 (action for libel for publication by corporation defendant of libelous matter in a newspaper).

Missouri: Johnson v. St. Louis Dispatch Co., 2 Mo. App. 565, *Id.*, 65 Mo. 639 (no question whatever that a printing and publishing corporation liable to action for damages for libel).

What does and does not constitute libel, see the following cases:

United States: American Book Co. v. Gates (U. S. C. C.), 85 Fed. 729 (when charge that corporation is in combination or trust is not a libel; when

and by reason thereof become liable to an action for damages by the person concerning whom the words were composed and published.⁵⁸ If a corporation sanctions the publication of a libel it is the publisher of the libel and liable in like manner as an individual, not because a corporation may act with malice, but because it has a capacity for voluntary action and is responsible for such action.⁵⁹ And where it appears that one writing a libelous letter in the name of a corporation had general management and exclusive control of the department of the corporate business, in the management of which the letter is written, the corporation is liable for punitive damages.⁶⁰ Again, in an action for libel the fact that a letter to a protective trade association, not fairly disclosing the facts, and in consequence of which a

charge as to methods of obtaining business is a libel); *Union Mutual Life Ins. Co. v. Thomas* (U. S. C. C. A.), 83 Fed. 803, 28 C. C. A. 96, 48 U. S. App. 575 (when matter in pleading, such as that plaintiff and her attorneys have entered into a conspiracy to defraud defendant, is not privileged).

Georgia: *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986 (when newspaper publication tending to hold an agent of a corporation out to the public as an imposter is libelous).

Kentucky: *Ratcliff v. Louisville Courier Journal Co.*, 99 Ky. 416, 36 S. W. 177, 18 Ky. L. Rep. 291 (if alleged libelous publication be proven subsequently true recovery is precluded).

Maine: *Thompson v. Lewiston Daily Sun Pub. Co.*, 91 Me. 203, 39 Atl. 556 (publication imputing crime of bigamy held libelous *per se*).

Massachusetts: *Haynes v. Clinton Printing Co.*, 169 Mass. 512, 48 N. E. 275 (publication conveying inference that person is guilty of murder is libelous).

New York: *Gates v. New York Recorder Co.*, 156 N. Y. 228, 49 N. E. 769, aff'g 83 Hun, 614 (when charge involving unchastity of a woman is libelous *per se*).

Wisconsin: *Gillan v. State Journal Printing Co.*, 96 Wis. 460, 71 N. W. 892 (when charge of moral turpitude not conveyed by publication so as to warrant damages unless special damages are pleaded and proven).

⁵⁸ *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672.

⁵⁹ *Vinas v. Merchants' Mutual Ins. Co. of New Orleans*, 27 La. Ann. 367. It is as possible for a corporation as for an individual to act maliciously. And it has been held that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as might imply malice in law sufficient to support the action; and there may be circumstances by which express malice in fact might be proved, such as to make a corporation aggregate liable therefor in its corporate capacity. *Id.*

⁶⁰ *Rose v. Imperial Engine Co.*, 112 N. Y. Supp. 8, 127 App. Div. 885.

plumber is placed upon the "cash before delivery list," was sent, not by the defendant personally, but by an under manager of his business, did not relieve the defendant from liability, as a master is liable for willful injury committed by a servant while engaged in the transaction of the master's business.⁶¹ But a railroad company is not responsible, under the rule of *respondeat ouster*, for a libel of an employé published by its general superintendent without authority from the corporation; nor is the superintendent himself responsible, when there is no evidence submitted that the libelous article was dictated, or even inspired by him.⁶² A corporation may be liable for slandering the business of another corporation in the same business.⁶³ In England a trading corporation may maintain an action for libel calculated to injure their reputation by reflecting on the management of their trade or business without alleging or proving special damage. The words complained of, in order to entitle a corporation to sue for libel or slander, must injuriously affect the corporation as distinguished from the individuals who compose it; such words must attack the company or corporation in the method of conducting its affairs, such as accusations of fraud or mismanagement or an attack upon its financial position.⁶⁴ And a joint-stock company there may maintain an action for libel against a shareholder of the company.⁶⁵

⁶¹ *Trapp v. Du Bois*, 78 N. Y. Supp. 505, 76 App. Div. 314. See § 317, herein.

⁶² *Henry v. Railroad Co.*, 139 Pa. St. 289, 27 Wkly. Notes, Cas. 322, 21 Atl. 157. Action of trespass.

⁶³ *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun (49 N. Y. Sup. Ct.), 153, 3 N. Y. St. Rep. 450, aff'd in 106 N. Y. 669, 8 N. Y. St. Rep. 876. Also what facts show this to have been done; *pleadings should allege* that acts complained of were done by the corporation and not by its agents; there was also a charge of conspiracy against defendants.

⁶⁴ *South Hetton Coal Co., Ltd., v. Northeastern News Assoc., Ltd.*, 63 L. J. (N. S.) Q. B. 293, 297.

⁶⁵ *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 Hurl & Norm. 87. Company incorporated under 19 & 20 Vict., c. 47. Pollock, C. B., said: "That a corporation at common law can sue in respect to libel there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. * * * It would be very odd if a corporation had no means of protecting itself

§ 336. Malicious Prosecution.⁶⁶

An action for malicious prosecution may be maintained against a corporation.⁶⁷ So railroad companies are liable in an action for damages for malicious and groundless prosecutions instituted through the malice of their officers.⁶⁸ "The old doctrine was that a corporation was not so liable, because malice is the gist of the action, and it was said, that malice could not be imputed to a mere legal entity, which having no mind could have no motive, and, therefore, no malice, and this narrow view still prevails to some extent. But the steady process of judicial evolution has led to the establishment, in some of the courts, of the just doctrine of the civil responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents under the conditions that attach to individuals."⁶⁹

against wrong; and if its property is injured by slander, it has no means of redress except by action. Therefore it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured."

⁶⁶ See §§ 313, 317, herein.

⁶⁷ *United States*: Copley v. Grover & Baker Sewing Machine Co., 2 Woods (U. S. C. C.), 494, Fed. Cas. No. 3,213.

Alabama: Jordan v. Alabama Great Southern Rd. Co., 74 Ala. 85, 49 Am. Rep. 800.

Illinois: Springfield Engine & Threshing Co. v. Green, 25 Ill. App. 106 (so, although corporation can only act through its agents).

Indiana: Pennsylvania Co. v. Waddle, 100 Ind. 138 (arrest by agent employed by corporation to detect offenders against its property and arrest them).

Maryland: Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311 (action lies against a corporation aggregate for malicious prosecution).

Massachusetts: Reed v. Home Savings Bank, 130 Mass. 443, 39 Am. Rep. 468 (such an action lies against a savings bank, citing numerous cases to the general point that such an action lies against a corporation).

Mississippi: Williams v. Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494 (liable to such action like a natural person).

New Jersey: Vance v. Erie Ry. Co., 32 N. J. L. 334, 90 Am. Dec. 665.

New York: Morton v. Metropolitan Life Ins. Co., 34 Hun (N. Y.), 366. Compare Owsley v. Montgomery & West Point Rd. Co., 37 Ala. 560.

⁶⁸ Gillett v. Missouri Valley Rd. Co., 55 Mo. 315, 17 Am. Rep. 653.

⁶⁹ Williams v. Planters' Ins. Co., 57 Miss. 759, 34 Am. Rep. 494, per Campbell, J. See § 317, herein.

"It was contended at the argument, that an action for malicious prosecution

To support a judgment for the malicious prosecution of a civil action, it must be alleged and proved that such action was prosecuted without probable cause, with malice, its termination in favor of defendant, and damages to defendant over and above the taxable costs in the case.⁷⁰

§ 337. Wrongfully Suing Out Attachment.⁷¹

An action may be maintained against a corporation to recover damages for wrongfully, and without just or probable cause obtaining and levying an order of attachment upon personal property.⁷² And in an action on the case against a corporation for suing out an attachment without sufficient cause and maliciously the corporation is to be held liable in all cases where an individual would be responsible under similar circumstances.⁷³ So a corporation may be held liable for exemplary

execution so differs from other actions that it cannot be maintained against a corporation. But although, in order to maintain such an action, both malice and want of probable cause must be found, yet proof of want of probable cause, will warrant the jury in inferring malice. *Mitchell v. Jenkins*, 5 B. & Ad. 588; s. c., 2 Nev. & Man. 301; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Stone v. Crocker*, 24 Pick. 81; *Ripley v. McBarron*, 125 Mass. 272. And, by the great weight of modern authority, a corporation may be liable even when a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation; as in actions for fraudulent representations: *National Exchange Co. v. Drew*, 2 Macq. 103; *New Brunswick & Canada Ry. v. Conybère*, 9 H. L. Cas. 711, 738, 740; *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259, for libel: *Philadelphia, Wilmington & Baltimore Rd. Co. v. Quigley*, 21 How. (62 U. S.) 202, 16 L. ed. 73; *Whitfield v. Southeastern Ry.*, E. B. & E. 115; or for malicious prosecution: *Vance v. Erie Ry.*, 32 N. J. L. 334; *Copley v. Grover & Baker Co.*, 2 Woods (U. S. C. C.), 494; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Carter v. Howe Machine Co.*, 51 Md. 290; *Wheless v. Second Nat. Bank*, 1 Baxter (Tenn.), 469; *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Walker v. Southeastern Railway*, L. R. 5 C. P. 640; *Edwards v. Midland Ry.*, 6 Q. B. D. 287," per Lord, J., in *Reed v. Home Savings Bank*, 130 Mass. 443, 39 Am. Rep. 468.

⁷⁰ *Carbondale Investment Co. v. Burdick*, 67 Kan. 329, 72 Pac. 781.

⁷¹ See §§ 313, 317, herein.

⁷² *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786, evidence as to exemplary damages also considered.

⁷³ *Wheless v. Second National Bk.*, 60 Tenn. 469, 25 Am. Rep. 783.

damages in suing out an attachment wrongfully and maliciously.⁷⁴

§ 338. Conspiracy—Instances.

Where a railroad company is sued with others for a conspiracy to expel plaintiff from a brotherhood of locomotive engineers and the railroad did not and could not actually participate in the act of expelling him from the order, its liability must rest upon the ground alone of the conspiracy; and where the jury distinctly found for the defendants other than the railroad company and thereby acquitted all other defendants from having entered into the conspiracy with the railroad company, and the latter is found the only guilty party, it follows that an acquittal of all other defendants acquitted said railroad company, as a conspiracy cannot be formed by one person.⁷⁵

A corporation owning the principal theaters giving burlesque shows in the chief cities of the country, by requiring the owners of such shows to agree not to play in any theaters not owned or controlled by it as a condition of booking such shows for its own theaters, is exercising a legal right where the number of companies with which such agreement is made is not greater than is reasonably necessary to supply its own theaters with suitable attractions. The fact that such an agreement caused some of the companies to rescind prior bookings made with another theater not controlled by the syndicate does not render it liable to the owner of the theater so injured, even though it caused financial loss and practically prevented the other manager from obtaining suitable attractions. This is true, although it appears that the syndicate bore an ill will to the theater owner so ruined and desired to eliminate competition. If the means employed to do an act are lawful, it is of no consequence that the motive which induced the act was malicious.⁷⁶

⁷⁴ *Jefferson County Savings Bk. v. Eborn*, 84 Ala. 529, 4 So. 386, suit was one on an attachment bond claiming damages both actual and exemplary.

⁷⁵ *St. Louis Southwestern Ry. Co. of Texas v. Thompson*, 102 Tex. 89, 113 S. W. 144, rev'g 108 S. W. 453.

⁷⁶ *Roseneau v. Empire Circuit Co.*, 115 N. Y. Supp. 511, 131 App. Div. 429 (action for alleged unlawful conspiracy maliciously formed to ruin the

§ 339. Fraud and Deceit—Instances.⁷⁷

The essential elements necessary to constitute a cause of action for deceit are (a) representations; (b) falsity; (c) scienter; (d) deception; (e) injury. To these elements, however, should be added another qualification, and that is that the representation should have been intended to influence the action of the person injured by them, that is, to influence the action of the particular person defrauded or the action of a class of which he is a constituent member. If addressed to the public generally or to a class, then any person belonging to the class may sue; if addressed to a limited class only as the persons intended to be influenced, then as a rule persons outside that class with whom the persons making the statement have no dealings but who may have been injured by reliance upon such statements independently coming to their knowledge cannot maintain an action upon them for fraudulent deceit.⁷⁸

business of a theater of which plaintiff was the receiver with authority by order of court to continue the action).

⁷⁷ See § 313, herein.

⁷⁸ *Greene v. Mercantile Trust Co.*, 111 N. Y. Supp. 802 [aff'd in (mem.) 128 App. Div. 914, 112 N. Y. Supp. 1131], per Wheeler, J., a case of prospectus to invite subscriptions to "bonds" and "stocks" of a company.

What must appear or be shown in order to sustain action for fraud or deceit; essentials; prerequisites, see the following cases:

United States: *Farwell v. Colonial Trust Co.* (U. S. C. C. A.), 147 Fed. 480, 78 C. C. A. 22; *Stratton's Independence v. Dines*, 135 Fed. 449, 68 C. C. A. 161, aff'g 126 Fed. 968.

Alabama: *Hartford Fire Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651; *Clark v. Dunham Lumber Co.*, 86 Ala. 220, 5 So. 560.

Arkansas: *Binghamton Trust Co. v. Auten*, 68 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105.

Georgia: *Lewis v. Equitable Mtge. Co.*, 94 Ga. 572, 21 S. E. 224.

Illinois: *Educational Co. v. Taggart*, 121 Ill. App. 567.

Iowa: *King v. Sioux City Loan & Im. Co.*, 76 Iowa, 11, 39 N. W. 919.

Maine: *Atlas Shoe Co. v. Rechard*, — Me. 206, 66 Atl. 390; *Skowhegan First Nat. Bk. v. Maxfield*, 83 Me. 576, 22 Atl. 479.

Maryland: *Donnelly v. Baltimore Trust & Guarantee Co.*, 102 Md. 1, 61 Atl. 301.

Massachusetts: *Nash v. Minnesota Title Ins. & T. Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753; *Dawe v. Morris*, 149 Mass. 188, 4 L. R. A. 102, 21 N. E. 313; *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743.

Missouri: *Remmers v. Remmers*, 217 Mo. 541, 117 S. W. 1117.

Statements in a prospectus issued by a trust company, offering for sale the entire capital stock of a mining corporation capitalized at fifty thousand dollars; that the corporation had been operated for two years at a large profit; that the net earnings, after deducting all royalties and expenses for the six months preceding the issuing of the prospectus, were twelve thousand, one hundred and thirty-four dollars and twenty cents, all of which was applicable to dividends; that it was the intention to pay one or one and a half per cent dividends semi-monthly and extra dividends in addition thereto as often as should be deemed prudent, reserving at all times sufficient cash on hand to cover any contingency that might arise, amount to something more than a mere expression of an intention to pay dividends, and the falsity of such representations will furnish the basis of an action of fraud against the trust company by persons who purchase stock of the mining company in reliance thereon. The measure of damages recoverable in such an action is the difference between what would have been the value of the stock if the representations had been true and the actual value of the stock.⁷⁹

Nebraska: American Bldg. & L. Assoc. v. Bear, 48 Neb. 455, 67 N. W. 500.

New York: Rothmiller v. Stein, 143 N. Y. 581, 62 N. Y. St. Rep. 788, 38 N. E. 718, 26 L. R. A. 148; Scarsdale Pub. Co. Colonial Press v. Carter, 116 N. Y. Supp. 731, 735, 63 Misc. 271; Albany Hardware & Iron Co. v. Day, 42 N. Y. Supp. 971, 11 App. Div. 230.

Tennessee: Barnard v. Roane Iron Co., 85 Tenn. 139, 2 S. W. 21.

Texas: Cohen Brothers v. Missouri, Kansas & T. Ry. Co. of Tex. (Tex. Civ. App., 1906), 98 S. W. 437.

Wisconsin: Hurlbert v. T. D. Kellogg Lumber & Mfg. Co., 115 Wis. 225, 91 N. W. 673; Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507.

⁷⁹ *Benedict v. Guardian Trust Co.*, 86 N. Y. Supp. 376, 91 App. Div. 103, aff'd in (mem.) 180 N. Y. 558, 73 N. E. 1120.

When prospectus issued to obtain increase of capital is fraudulent as to overvaluation of assets, see *Bartol v. Walton & W. Co.* (U. S. C. C.), 92 Fed. 13.

When prospectus issued by corporation to obtain increase of capital stock is not fraudulent as to estimate, see *Bartol v. Walton & W. Co.* (U. S. C. C.), 92 Fed. 13.

When prospectus of promoter as to value of land to be transferred to

The failure of an agent, employed by a corporation to solicit subscriptions to a syndicate agreement, to communicate to his principal the withdrawal of a subscriber to the syndicate agreement, does not render such agent liable to the withdrawing subscriber, as whatever duty was incumbent upon the agent in this respect it was due to his principal and not to the withdrawing subscriber. "If any cause of action could be based upon the action of the defendants in informing plaintiff that his subscription was in process of cancellation it would be only an action at law for damages, and no such action would lie, if at all, unless it appeared that the statement was false, that plaintiff believed it and in reliance upon it did or refrained from doing something, and that he thereby suffered damage."⁸⁰ Where by fraud of its agent, an express company induces one to deliver it money to be carried and delivered to a fictitious person, and the money is delivered by the company to such agent, and is embezzled by him, the shipper can recover of the company therefor in an action for money had and received.⁸¹ Fraud does not exist as a matter of law merely because the corporate name is similar to that of a copartnership under which business had theretofore been done by the charter members.⁸² A complaint alleged in substance that the stock of the H. V. Manufacturing Company was one hundred and twenty thousand dollars, of which the plaintiff's husband owned sixty thousand dollars, and his brothers, the defendants, C. V. & W. V., the rest; that the plaintiff's husband died, and she succeeded to the ownership of his stock; that her said two brothers-in-law, and their lawyer, defendant W., represented to the plaintiff that the company was insolvent, and thereby induced her to unite with them in a petition for dissolution of the company, she believing the same; that the representation was

corporation is not fraudulent, see *Milwaukee Cold Storage Co. v. Dexter*, 99 Wis. 414, 74 N. W. 976, 40 L. R. A. 837.

⁸⁰ *Eames v. Brunswick Construction Co.*, 94 N. Y. Supp. 24, 104 App. Div. 566.

⁸¹ *Southern Express Co. v. Bank of Tupelo*, 108 Ala. 517, 18 So. 664.

⁸² *Bristol Bank & T. Co. v. Jonesboro B. & T. Co.*, 101 Tenn. 545, 48 S. W. 228.

false, and known by them to be false, and was made to induce the plaintiff to join in a dissolution of the company, so as to enable the said defendants C. V. & W. V. to acquire and succeed to the business of the company after such dissolution; that they did organize a new company with another one of the defendants, J. V., and acquire and continue the said business; and that the plaintiff's stock was thereby made valueless. No fraud was alleged against J. V. It was held that the foregoing stated a good cause of action for fraud against all the defendants except J. V.⁸³

The New York Code of Civil Procedure⁸⁴ does not operate to preclude parties who purchased stock in reliance upon false representations from assigning their claims to some of their number, for the purpose of enabling the latter to bring an action to recover the entire damages resulting from the fraud.⁸⁵

If the plaintiff's officers were negligent in not discovering a fraud, that fact would not afford a defense. When one party has been guilty of an intentional and deliberate fraud by which to his knowledge another party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by showing that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care.⁸⁶

One who has been induced to convey his property by fraud or deceit has an election of remedies, either to bring an action to set aside the conveyance, unless the property has passed into ownership of a purchaser for value without notice, or, allowing the conveyance to stand, he may sue to recover damage for the pecuniary injury inflicted upon him by the fraud. Retaining the purchase price is not, in the latter case, a ratification of the deed.⁸⁷

⁸³ *Vogt v. Vogt*, 104 N. Y. Supp. 164, 119 App. Div. 518.

⁸⁴ N. Y. Code of Civil Proc., §§ 73, 77.

⁸⁵ *Benedict v. Guardian Trust Co.*, 86 N. Y. Supp. 376, 91 App. Div. 103, *aff'd* in (mem.), 180 N. Y. 558, 73 N. E. 1120.

⁸⁶ *Eastern Trust & Banking Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17.

⁸⁷ *Modlin v. Roanoke Ry. & Navigation Co.*, 145 N. C. 218, 58 S. E. 1075 (civil action to recover damages for fraud and deceit).

To support an action for deceit, the plaintiff must show that the defendant intentionally made false representations to him, with the intent that he should act upon them, or in such manner as would naturally induce him to act upon them, that the representations were material, and that they were known to the defendant to be false, or being of matters susceptible of knowledge, were made as of a fact of his own knowledge, that the plaintiff was thereby induced to give credit or part with property, that he was deceived, and that he was injured.⁸⁸

Pending a valid option to purchase land, the party holding the option is the only one who can make a sale of it or fix a price. A representation, therefore, by the holder of the option that he owns the land, and that it cannot be bought for less than a stated sum is not such a fraud upon a purchaser from him as will entitle such purchaser to recover damages for deceit. The question of ownership was immaterial, and the price was under his control. The mere fact that an option is taken for the purpose of speculation does not constitute fraud or unfair dealing on the part of the person taking the option.⁸⁹

Under a Maine decision it appeared that the corporation of which the defendant was treasurer had an account in the plaintiff bank in Bangor, and another in a bank in Gardiner, in both of which places it was engaged in business. For many months prior to the drawing of the checks which were the basis of the action, the defendant had practiced what is known as "Kiting" checks between the plaintiff bank and the bank in Gardiner. He deposited daily in each bank checks, drawn on the other bank to meet which the defendant knew were no available funds in the drawee bank, and which he knew could only be met by the deposit of other similar checks. The bank at Gardiner discovered the practice, and finally refused payment of a check drawn upon itself, which the defendant had deposited in the plaintiff bank, and which had been forwarded for collection, and caused it to be protested. Before the plaintiff

⁸⁸ *Eastern Trust & Banking Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17.

⁸⁹ *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S. E. 423 (error in judgment in action of trespass on the case).

bank had notice of the nonpayment and protest, it had accepted two other similar checks, credited them on the account of the defendant's corporation, and forwarded them for collection. Payment of these checks was refused, and they were in their turn protested. The result was that the plaintiff bank lost the amount of the three checks, less a small balance which was to the credit of the corporation when notice of nonpayment was first received. The court was of opinion that the evidence did not warrant a finding that the officers of the plaintiff bank knew of the "Kiting" practice. On the contrary, it was considered that the plaintiff was induced to give credit to the defendant's corporation by his implied representation, which was false, and that it was deceived thereby. Upon these facts, it was held that the defendant was liable in an action for deceit.⁹⁰

§ 340. Trover and Conversion.⁹¹

Trover may be maintained against a corporation aggregate.⁹² But a corporation has neither a general or special right to the property upon which to maintain an action of trover, where, prior to the alleged conversion of the property, it has transferred the notes therefor, retaining title to the property in question to another.⁹³ Trover lies for the wrongful conversion of shares of stock by a corporation, and any act of dominion wrongfully exercised over the property of another inconsistent with his rights or constituting a denial thereof may be treated as a conversion. This is as applicable to shares of stock as to

⁹⁰ *Eastern Trust & Banking Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17.

⁹¹ See § 313, herein.

⁹² *Beach v. Fulton Bank*, 7 Cow. (N. Y.) 485.

When action is for trover and not for breach of contract of bailment, in case of wheat stored by owner under agreement for storage, also for purchase by warehouseman, and refusal, see Kramer v. Northwestern Elevator Co., 91 Minn. 346, 98 N. W. 96.

Conversion of wheat; measure of damages, see Dows v. National Exchange Bank, 91 U. S. 618, 23 L. ed. 214.

⁹³ *Union Iron Works Co. v. Union Naval Stores Co.*, 157 Ala. 646, 47 So. 652.

other property. Such conversion may be by the corporation or by a third party. If the corporation's by-laws or a statute require that transfers of stock be made on its books, a wrongful refusal by the corporation to make such transfer constitutes a conversion of the stock.⁹⁴ If a bank receives the proceeds it is liable for the conversion of bonds left with its president for exchange.⁹⁵ But an action to recover damages for conversion of corporate stock cannot be maintained against a corporation by one who has not the legal title thereto.⁹⁶ The rule, that one who comes lawfully into possession of the property of another cannot be charged with the conversion thereof until after demand and refusal, has no application where the lawful custodian commits an overt and possible act of conversion by an unlawful sale or disposition of the property. So where negotiable bonds of a corporation, issued for corporate purposes only, and lawfully in the custody of a trust company, designated as trustee of the mortgage executed to secure the bonds, were wrongfully pledged to the company by the secretary of the corporation as security for loans to himself, personally, the apparent participation of the company in the wrongful act of the secretary, with full knowledge thereof, by its acceptance of the bonds as a pledge, did not, in the absence of a demand and a refusal, constitute a conversion; for it might still have elected to hold the bonds as trustee. But where, in consideration of the payment of its loan to said secretary by a certain bank, the trust company transferred the bonds to such bank, it assumed to treat them as its own and from that moment was guilty of a conversion of the bonds, and no demand therefor by the true owner thereof was necessary. Although, at the time the bonds in question were transferred by the trust company to said bank, in consideration of the payment by the latter of the secretary's indebtedness to the company, the bonds had been

⁹⁴ *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 103 N. W. 685, 119 Am. St. Rep. 917.

⁹⁵ *Van Leuven v. First Nat. Bank of Kingston*, 54 N. Y. 651, aff'g 6 Laws, 373.

⁹⁶ *Morrison v. Gold Mountain Gold Min. Co.*, 52 Cal. 306. What does not amount to such a conversion also decided.

attached in an action brought by said bank against the secretary, that fact does not relieve the trust company from the charge of conversion arising from the transfer of the bonds; where the attachment was invalid because the action was brought against the secretary and not against the corporation which owned the bonds, and where the trust company instead of notifying the owner of the bonds, or resisting the attachment action, assumed to hold the bonds as pledgee, and, upon the discontinuance of the action and the falling of the attachment, voluntarily turned them over to the bank in consideration of the payment of the secretary's indebtedness for which the bonds were pledged.⁹⁷

When the manager of a life assurance society appoints an agent to canvass for applications and collect premiums on all policies obtained by him, which premiums so collected are to be paid by the agent to the manager of the society, then as between the manager and agent the manager has a special property in the premiums collected by the agent and is entitled to receive them, and this right gives him a remedy against the agent upon his refusal to pay over the same as directed. Legal currency may be the subject of an action of trover as there is nothing in the nature of money making it an improper subject of this form of action so long as it is capable of being identified, as when delivered at one time, by one act and in one mass, or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained. So where the relation of a plaintiff and defendant is that of principal and agent, it is necessary in determining whether trover or assumpsit is the proper remedy for money collected by the agent but not turned over, to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the agent in receiving and retaining the money collected by him. From its nature the title to money passes by delivery, and its identity is lost by being

⁹⁷ *McDonnell v. Buffalo Loan, Trust & Safe Deposit Co.*, 193 N. Y. 92, 85 N. E. 801, *aff'g* 104 N. Y. Supp. 625, 119 App. Div. 243.

changed into other money or its equivalent in the methods ordinarily used in business for its safe-keeping and transmission, and an agent unless restricted by his contract would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion. Nor would the refusal to pay over its equivalent be conclusive evidence of its conversion in the sense of the law of trover, but might be the ground for an action of *assumpsit*. When the defendant is the agent of the plaintiff for the collection and paying over not of a single premium of insurance but such as are payable for all policies affected by him and he is entitled to receive as commission a certain percentage of such premiums when paid over, an action of trover by the principal might be unjust to the agent by depriving him of his right of set-off and other legal defenses. In a case where the relation of principal and agent existed between the plaintiff and the defendant and the principal brought an action of trover against the agent for money alleged to have been collected by the agent and converted to his own use it was held, that under all the circumstances of the case the action could not be maintained.⁹⁸ If a person wrongfully works a mine, takes out ores therefrom, removes them, and converts them to his own use he is not entitled, in an action to recover their value, to be credited with the cost of mining the ores.⁹⁹

§ 341. Replevin—Claim and Delivery.¹

A certificate of stock is tangible personal property which may be recovered in an action of replevin.² So an action of replevin by the owner of personal property will lie against the

⁹⁸ *Haselton v. Locke*, 104 Me. 164, 71 Atl. 661, 20 L. R. A. (N. S.) 35.

⁹⁹ *Benson Mining & S. Co. v. Alta Mining & S. Co.*, 145 U. S. 428, 36 L. ed. 962, 12 Sup. Ct. 877.

¹ See § 313, herein.

² *Opperman v. Citizens' Bank of Michigan City* (Ind. App., 1908), 85 N. E. 991, 992, citing *Smith v. Downey*, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 467; *Read v. Brayton*, 143 N. Y. 342, 38 N. E. 261; *Cook on Corp.* (4th ed.), § 577.

person who has such personal property in his possession and who has no right to retain it as against the owner.³

A boom company that acquires possession of logs by the maintenance of a boom in violation of a decree of court is a trespasser and wrongdoer and cannot maintain replevin on the theory that defendant unlawfully opened plaintiff's boom; since in replevin the plaintiff must succeed, if at all, upon the strength of his own title.⁴ Replevin cannot be maintained against a freight agent of a railroad company, where he has no possession or control of the property except as agent of the company.⁵

Where property is pledged to secure specific indebtedness, the pledgee has no right to hold it as security for any other obligation.⁶ If the pledgee wrongfully parts with the property, or, upon tender of the secured debt, refuses to return it, the pledgor may maintain an action at law for damages, or, where such relief is appropriate, to regain the property itself by claim and delivery. Or he may, if there are circumstances authorizing a demand for equitable relief, and redemption is possible, bring a suit to establish and enforce his right of redemption. Shares of corporate stock, however, being intangible property cannot be recovered in an action of claim and delivery.⁷

³ *Opperman v. Citizens' Bank of Michigan City* (Ind. App., 1909), 85 N. E. 990, 992, citing *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161; *Aultman v. Forgery*, 10 Ind. App. 397, 34 N. E. 829; *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829; *Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213; *Rose v. Cash*, 58 Ind. 278; *Walpole v. Smith*, 4 Blackf. (Ind.) 304; *Bradley v. Michael*, 1 Ind. 551; *Read v. Brayton*, 143 N. Y. 342, 38 N. E. 261.

⁴ *North Shore Boom & Driving Co. v. Nicomen Boom Co.*, 52 Wash. 564, 101 Pac. 48.

⁵ *McDougall v. Travis*, 24 Hun (N. Y.), 590.

⁶ Cal. Civ. Code, § 2891; *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. ed. 934.

⁷ *Bell v. Bank of California* (Cal., 1908), 94 Pac. 889, 891.

CHAPTER XXI

ACTIONS AT LAW CONTINUED—MANDAMUS

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§§ 342, 343 ACTIONS AT LAW CONTINUED—MANDAMUS

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| <p>§ 369. When Mandamus Lies and Does Not Lie Against Street Railroad Company.</p> <p>370. When Street Railway Company Is and Is Not Entitled to Mandamus.</p> <p>371. When Mandamus Lies and Does Not Lie Against Telephone Companies.</p> <p>372. When Mandamus Lies and Does Not Lie Against Telegraph Companies.</p> <p>373. When Mandamus Lies and Does Not Lie Against Water Companies.</p> | <p>§ 374. Jurisdiction of Mandamus Proceedings.</p> <p>375. Proper or Necessary Parties, Generally.</p> <p>376. Parties Plaintiff — Private Persons.</p> <p>377. Parties—Attorney-General.</p> <p>378. Parties—Defendants.</p> <p>379. Necessity of Demand Upon or Notice to Party Before Bringing Mandamus.</p> <p>380. Defenses Available, Generally.</p> <p>381. Pleadings — Sufficiency of Showing — Demurrer — Judgment—Appeal.</p> |
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§ 342. Mandamus Defined.

Mandamus, as defined by the Kentucky Code¹ and the courts, is a writ commanding the performance of some duty, in which performance the applicant for the writ is interested, or by the nonperformance of which he is aggrieved or injured.²

§ 343. Nature of Mandamus.

The remedy by mandamus is not one which is accorded *ex debito justitiæ*. The court is a prerogative one, and unless the right, which the relator seeks to enforce, is clear and unequivocal, a mandamus will not be granted.³ It is declared, however, that "mandamus, even in the common-law view of it, long ago ceased to be a prerogative writ, and became gradually, both in the English and American courts, to be regarded as a writ of right. Since the breaking down by the codes of so many of the formal barriers between equity and law, the remedy by mandamus, however different its legal history from the writ of injunction, is none the less elastic and adaptable within its

¹ Ky. Civ. Code Pract., § 477.

² Louisville Home Telephone Co. v. City of Louisville, 130 Ky. 611, 113 S. W. 855. See McCoy v. State, 2 Marv. (Del.) 543, 36 Atl. 81; Sears v. Kincaid, 33 Ore. 215, 53 Pac. 303.

Writ of mandamus is either alternative or peremptory under New York Code of Civ. Proc., § 2067.

³ State ex rel. v. Latrobe, 81 Md. 222, 31 Atl. 788.

proper sphere, as the latter is within its sphere. The function of each is by summary legal intervention to prevent wrongdoing. The one sets the law in motion to compel the doing of what should be done; the other prevents or checks threatened or actual wrongdoing.”⁴

§ 344. Nature of Mandamus Continued—Is a Discretionary Writ.

Mandamus is a discretionary writ.⁵ An application for a peremptory writ of mandamus is addressed to the sound discretion of the court, and where it appears that the facts are such as to justify the court in refusing the writ as a matter of discretion, a Court of Appeals will not interfere unless it affirmatively appears in the order denying the writ that the court did not refuse the writ in the exercise of its discretion; and where it does not appear from an order denying an application for such writ that the court below refused to grant the writ for want of power, or upon any other question of law, the proceeding is not reviewable in a Court of Appeals.⁶

§ 345. When Mandamus Lies, Generally.

The writ of mandamus can only be used to enforce duties and obligations clearly imposed upon a corporation by the charter or general law, and not to enforce and establish those of doubtful expediency and propriety.⁷ And the writ cannot be maintained, unless there is a legal right in the applicant for the

⁴ *State ex rel. Great Falls Water Works v. Great Falls City Council*, 19 Mont. 518, 537, 538, 49 Pac. 15, per Buck, J.

⁵ *Citizens' Life Ins. Co. v. Commissioner of Ins.*, 128 Mich. 85, 87 N. W. 126, 30 Ins. L. J. 919; *Lamphere v. Grand Lodge Ancient Order U. W.*, 47 Mich. 429.

⁶ *People ex rel. Lekmaier v. Interurban Ry. Co.*, 117 N. Y. 296, 69 N. E. 596, dismissing appeal from 83 N. Y. Supp. 622, 85 App. Div. 407.

⁷ *Sherwood v. Atlantic & Danville Ry. Co.*, 94 Va. 291, 306, 26 S. E. 943, 6 Am. & Eng. R. Cas. (N. S.) 670, citing or quoting from *Northern Pac. Rd. Co. v. Dustin*, 142 U. S. 492, 498, 499, 12 Sup. Ct. 283, 285, 35 L. ed. 1092; *Union Pacific Rd. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *Commonwealth v. Fitchburg Rd. Co.*, 12 Gray (Mass.), 180; *State v. Sioux City & P. Rd. Co.*, 7 Neb. 357, 374; *People v. Rome, W. & O. Rd. Co.*, 103 N. Y. 106, 8 N. E. 369.

writ and a corresponding duty imposed on the respondent.⁸ Mandamus is a proper proceeding to compel obedience to a city's orders, made in the legal exercise of its police powers, as where it is sought to compel the removal of poles in the course of street improvements.⁹

§ 346. Mandamus to Control Judicial Discretion.

A writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction.¹⁰ So the rule that mandamus will not lie to control the judicial discretion of an inferior court does not apply to an attempt of that court to exercise its discretion on subject-matter not within its jurisdiction.¹¹ And the writ will not lie at the instance of a corporation to compel the court to vacate an order appointing a trustee.¹² Again, the fact that, in the administration of the assets of an insolvent corporation in the custody of receivers, summary proceedings are resorted to, does not, in itself, affect the jurisdiction of the Circuit Court, as having proceeded in excess of its powers, and, where notice has been given and hearing had, the result cannot properly be interfered with by mandamus.¹³

Where the bankruptcy court in adjudicating a corporation bankrupt is called upon to decide, and does decide, a question of fact, or of mixed law and fact, that adjudication cannot be reviewed by proceedings in mandamus. Mandamus to the

⁸ *Louisville Home Telephone Co. v. City of Louisville*, 130 Ky. 611, 113 S. W. 855; *State ex rel. Patterson v. Wenzel*, 55 Neb. 210, 75 N. W. 579. See *State ex rel. v. Latrobe*, 81 Md. 222, 31 Atl. 788, noted under § 343, herein.

⁹ *Monongahela City v. Monongahela Elec. L. Co.*, 12 Pa. Co. Ct. Rep. 529, 4 Am. Elec. Cas. 53.

¹⁰ *Rice, In re*, 155 U. S. 396, 39 L. ed. 498, 15 Sup. Ct. 194.

¹¹ *Winn, In re*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. 515. *Distinguishing Pollitz, In re*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. 729; *Nebraska, Ex parte*, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. 581.

¹² *Electric Park Amusement Co. v. Wayne*, Circuit Judge, 155 Mich. 640, 15 Det. L. N. 1083, 119 N. W. 1095.

¹³ *Rice, In re*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. 194.

bankruptcy court to dismiss proceedings in bankruptcy against a corporation because the petition failed to show that the principal business of the bankrupt was trading, printing, publishing, mining, manufacturing or a mercantile pursuit, will be refused.¹⁴

§ 347. Mandamus Will Not Be Granted When Fruitless and Unavailing.

A mandamus will not be awarded when the court is powerless to make it effectual and where it would be fruitless and unavailing to grant the order. Thus mandamus will be refused where it appears that if ordered to make the desired extension of its railroad it would be financially unable to obey and the writ would on that account prove ineffectual. The company's road in this case was in the hands of another corporation, which was in the hands of receivers of the Federal Circuit Court, who are amenable only to the court of their appointment, and no traffic arrangements could be compelled with another independent road and the writ would, if awarded, be wholly unavailing.¹⁵ So the writ will not issue to compel the Secretary of State to file the articles of association of a foreign corporation a tontine investment company, where, subsequent to the filing of the petition, a statute has become operative under which the rights claimed by relator have been abrogated.¹⁶ But such writ may be the proper remedy in a case where an injunction could not be maintained because the wrong complained of had been accomplished.¹⁷

§ 348. Mandamus Does Not Lie Where There Is a Plain and Adequate Remedy.

The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of

¹⁴ *Riggs, Matter of*, 214 U. S. 9, 53 L. ed. 887, 29 Sup. Ct. 598.

¹⁵ *Town of Strasburg v. Winchester & Strasburg R. Co.*, 94 Va. 647, 27 N. E. 493.

¹⁶ *Preferred Tontine Mercantile Co. v. Secretary of State*, 133 Mich. 395, 95 N. W. 117.

¹⁷ *Golden Star Lodge No. 1 v. Watterson*, 158 Mich. 696.

the law.¹⁸ So in Indiana such a writ is not proper if there is another adequate remedy, and the rule does not obtain that such writ is not proper unless there is no other remedy.¹⁹ And the writ cannot be used to perform the office of a writ of error or an appeal even if no appeal or writ of error is given by law.²⁰

The "adequate remedy" which will bar mandamus must be such as reaches the end intended, and actually compels the performance of the duty in question. It must be equally as convenient, beneficial and effective, as the proceeding by mandamus. The remedy by repeated actions at law to recover damages for a constantly recurring and continued violation of duty is not adequate.²¹ This writ is, however, the duly sufficient remedy where the legal remedy is uncertain, indefinite and inadequate.²² And the general rule is that mandamus will be granted whenever there is a legal as distinguishable from an equitable right, without a specific legal remedy. And this principle has been applied to the collection of a tax, where there was no other adequate remedy for collecting the tax, and a mandamus was issued.²³

¹⁸ *Horton v. State*, 60 Neb. 701, 84 N. W. 87. See also *Atlantic City Rd., In re*, 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. 208; *State ex rel. Norcross v. Board of Medical Examiners*, 10 Mont. 162, 25 Pac. 440; *State ex rel. Jones v. Williams*, 54 Neb. 154, 74 N. W. 396; *Fraternal Mystic Circle v. State*, 39 Ohio L. J. 43, 48 N. E. 940.

¹⁹ *State ex rel. Morgan, Assessor, v. Real Estate Bldg. & Loan Assoc.*, 151 Ind. 502, 51 N. E. 1061, a case of mandamus to permit county assessor to inspect corporation books.

²⁰ *Rice, In re*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. 194. See *Riggs, Matter of*, 214 U. S. 9, 53 L. ed. 887, 29 Sup. Ct. 598; *Hudson Oil & Supply Co., Matter of*, 214 U. S. 487 (same principle; prohibition); *Huguley Mfg. Co., In re*, 184 U. S. 297, 46 L. ed. 549, 22 Sup. Ct. 455.

²¹ *Richmond Ry. & Electric Co. v. Brown*, 97 Va. 26, 1 Va. S. C. Rep. 213, 32 S. E. 775.

²² *Golden Star Lodge No. 1 v. Watterson*, 158 Mich. 696.

²³ *Duryee v. United States Credit System Co.*, 55 N. J. Eq. 311, 312, 313, 37 Atl. 155. The court, per Emery, V. C., said: "But this statutory lien for taxes is strictly legal rather than equitable in its nature, and if there be no other method expressly provided of enforcing the lien by legal process, it is not at all clear that the Supreme Court cannot enforce the appropriation of the property subject to the lien, either by mandamus or by the issuing of process of execution for sale to pay the lien, analogous to the process of *levari facias* for this purpose, out of the exchequer (2 Tidd, Pr. 1042); or

Mandamus will lie from the Federal Supreme Court to compel the Circuit Court to remand a case to the State Court where it is apparent from the record that the Circuit Court has no jurisdiction whatever, and the writ will lie even though the party aggrieved may also be entitled to appeal or writ of error; and while mandamus never lies where the party praying therefor has another adequate remedy, and appeal or writ of error at the end of a litigation, which must go for nought, is not an adequate remedy for a plaintiff whose case has been wrongfully removed from a State Court to the Circuit Court, and held there against his protest.²⁴ So mandamus may be granted where an action of damages for breach of a contract would be an inadequate remedy.²⁵

The writ will also lie to compel the observance of a regulation made by the railroad commissioners under the powers conferred by the Florida Constitution,²⁶ requiring a terminal company to admit a railroad company to the privileges and benefits of its common passenger station or terminal, notwithstanding an action for damages or proceedings to enforce the penalty provided by the statute for failure to comply with the regulation might be maintained, as such remedies are inadequate and neither of them is adapted to secure the performance of the duty to the public imposed by such regulation.²⁷ But mandamus is not a proper remedy for the collection of the amount of a bond, there being an adequate remedy at law in which defendant can properly make defense.²⁸ Nor does the writ lie to compel an irrigation company to deliver water to a landowner pursuant to a private contract for water to irrigate the plaintiff's lands,

perhaps the lien might be enforced by *scire facias*, the assessment of taxes being in the nature of a record or judgment." *Id.* 314.

²⁴ Winn, *In re*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. 515. The petitioner in this case for mandamus, as assignee of the right of action of the shipper, brought in the State Court an action against an express company for the negligent transportation of a boar whereby the animal was killed.

²⁵ Baltimore University v. Colton, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108.

²⁶ Chap. 4700, Laws, 1899.

²⁷ State v. Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

²⁸ Barber Asphalt Paving Co. v. Village of Highland Park, 156 Mich. 178, 16 Det. L. N. 76, 120 N. W. 621.

since there is an adequate remedy at law in an action for damages.²⁹

§ 349. Statutory Remedies—When and When Not Exclusive of Mandamus.

A litigant will not be permitted to invoke the extraordinary remedy of mandamus where an express statute affords him an adequate remedy for the redress of the grievance of which he complains.³⁰ But the remedy provided by statute for the enforcement of orders of the railroad commissioners by action of mandamus is not exclusive.³¹

²⁹ *State ex rel. Krutz v. Washington Irrigation Co.*, 41 Wash. 283, 111 Am. St. Rep. 1019, 83 Pac. 308. The court, per Hadley, J., said: "In support of her contention that mandamus is the proper remedy here, she cites *Price v. Riverside Land & Irr. Co.*, 56 Cal. 431, and *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264. An examination of those cases, however, discloses that each was based squarely upon the theory that there was a refusal to discharge a public duty. It does not appear that a private contract between the parties existed in either case. Our statute provides that the writ of mandate will issue 'where there is not a plain, speedy, and adequate remedy in the ordinary course of law.' Bal. Code, § 5756. This is the general rule, and the courts hold that mandamus is a remedy to compel the performance of a duty required by law where the party seeking relief has no other adequate remedy, and where the duty sought to be enforced is clear and indisputable. *Board of Com'rs v. Aspinwall*, 24 How. 376, 16 L. ed. 184; *Bayard v. United States ex rel. White*, 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. ed. 116; *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. ed. 811; *Territory ex rel. Crosby v. Crum*, 13 Okl. 9, 73 Pac. 297; *State v. Paterson*, etc., R. Co., 43 N. J. L. 505. In Florida, etc., *R. Co. v. State ex rel. Tavares*, 31 Fla. 482, 13 So. 103, 34 Am. St. Rep. 30, 20 L. R. A. 419, it was said that mandamus will not lie to enforce the performance of private contracts; see also *State ex rel. Payser v. Trustee of Salem Church*, 114 Ind. 389, 16 N. E. 808; *Parrott v. Bridgeport*, 44 Conn. 180, 26 Am. St. Rep. 439; *Merrill, Mandamus*, § 16; *High, Extr. Legal Rems.* (3d ed.), § 25. We think appellant has an adequate remedy upon her contract, and that mandamus does not lie."

³⁰ *Nebraska Telephone Co. v. State ex rel. Yeiser*, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171.

³¹ *State v. Mason City & Fort Dodge Ry. Co.*, 85 Iowa, 516, 52 N. W. 490. The court, per Granger, J., said: "We are further cited to the constitutional provision that 'the district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and shall have jurisdiction in civil and criminal matters arising in their respective districts in such manner as shall be prescribed by law.' It is claimed that the remedy in such a case is by mandamus, under the decisions of this court which is said to be a law

A city charter gave its common council supervision over all bridges crossing a railroad in said city, with authority to order the building and repairing of such bridges in such manner and within such time as in its judgment public convenience might require; and provided that if any railroad should neglect to obey such order the city might do the work and recover the expense thereof from the delinquent railroad company. It was held that this remedy was not exclusive, and that mandamus by the State was an appropriate means of enforcing an order of the common council directing the defendant to build a bridge, where such order had been appealed from by the latter and affirmed by a judge of the Superior Court.³²

In California it does not rest in the discretion of the trial court or judge to refuse a commission to take depositions of witnesses in the cases defined by the Code, and although the order denying the application is appealable, that does not constitute a sufficient reason for holding that remedy exclusive, especially where it would be entirely inadequate; so mandamus would be the only remedy for the refusal of a commission in a proper case before judgment, and pending an appeal from the judgment. This applies to a case where the alleged negligence of a gas company has caused an explosion of gas, and it is sued

proceeding, and that, the law having prescribed such a proceeding, it is exclusive. It was held in *Boggs v. Railway Co.*, 54 Iowa, 435, 6 N. W. Rep. 744, that mandamus was a proper remedy to enforce such right, and other cases have been prosecuted by such a proceeding; but it is not held that such a remedy is exclusive. It should not be claimed that but a single remedy can be available to a party. The doctrine of the 'election of remedies' is old and familiar. It may further be said that the statute giving the courts jurisdiction to enforce orders of the commissioners was enacted after the case of *Boggs v. Railway Co.* was decided. It has not been held that an action to enforce the orders of the commissioners must be by proceedings by mandamus, nor by ordinary proceedings. It is provided by the act giving the courts jurisdiction in such cases that they shall be 'by equitable actions in the name of the State.' The law thus creates a new action, and defines the jurisdiction of the court having cognizance of it. If, indeed, there was error as to the kind of proceeding, it was waived by a failure to move for its correction 'at the time and in the manner prescribed. Code, § 2519.' "

³² *State v. New York, New Haven & Hartford Ry. Co.*, 71 Conn. 43, 40 Atl. 925.

to recover damages claimed to have been caused thereby and the company seeks to obtain a commission to take the deposition of a witness to perpetuate his testimony, such witness being the only one on the material point of the cause of the explosion and being also at the time under sentence of death expecting shortly to be executed, although his sentence was commuted.³³

Where, under a State Constitution:³⁴ "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures;" said last clause: "and shall provide for enforcing such laws by adequate penalties and forfeitures," does not by implication forbid the use of mandamus and other remedies for enforcing duties imposed by laws passed to accomplish the purposes specified in the first clause of the section. The clause quoted is a command to the legislature, leaving it no discretion upon that subject, but being silent as to other remedies for enforcing duties growing out of laws passed to accomplish the purposes specified in the first clause of the section, it rests in the legislative discretion to provide such as it may see fit, and the courts may apply such of the ordinary remedies as may be applicable.³⁵

§ 350. When Mandamus Is the Proper Remedy Although There Is Another Remedy—Action for Damage—Equity.

Mandamus will lie where an action for damages would be inadequate; and the existence of an equitable remedy is no bar to the issuance of the writ, although it may influence the court in the exercise of its discretion.³⁶ So mandamus and not a bill

³³ *San Francisco Gas & Electric Co. v. Superior Court*, 155 Cal. 30, 99 Pac. 359.

³⁴ Const. Fla., 1885, Art. XVI, § 30.

³⁵ *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 So. 225.

³⁶ *People ex rel. Frost v. New York Central & Hudson River Rd. Co.*, 168 N. Y. 187, 61 N. E. 172, rev'g 61 App. Div. 494, a case relating to the main-

in equity is the proper remedy to test the validity of the title of usurping officers of a religious corporation.³⁷ And the fact that a petitioner for such a writ has a remedy in equity by bill for specific performance is not a reason for refusing the writ.³⁸ So mandamus and not a bill in equity is the proper remedy to obtain the restoration to membership in a religious society and to test the validity of the expulsion of said member.³⁹ The remedy is also by mandamus and not by mandatory injunction where an executive officer refuses to perform a plain duty unmixed with discretion, and this applies in a case of refusal of the proper officer to receive a fee and issue a license to a company to establish an agency for selling its products. Such writ of mandamus is issued after a trial by the court and never in vacation.⁴⁰ And where there is a question as to the election and acceptance of membership in a religious corporation mandamus and not a bill in equity is the proper remedy.⁴¹ Again, the proper remedy to compel compliance with a statutory requirement to post the by-laws of a corporation in its principal place of business, is by mandamus and not by an injunction suit.⁴²

§ 351. When Remedy Is by Action at Law and Not by Mandamus.

Mandamus is not a proper remedy to compel the issuance of warrants to pay for lighting a city's streets, since an action at law should be brought to recover the same where the city claims an offset or counterclaim for breach of contract.⁴³ So redress for injuries received from private corporations organ-

tenance of culverts in a railway embankment and the issue of necessity of opening additional culverts on a motion for peremptory mandamus to restore certain culverts.

³⁷ *Saltman v. Nesson*, 201 Mass. 534, 88 N. E. 3.

³⁸ *Baltimore University v. Colton*, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108.

³⁹ *Saltman v. Nesson*, 201 Mass. 534, 88 N. E. 3.

⁴⁰ *Hager, Auditor, v. New South Brewing Co.*, 28 Ky. L. Rep. 895, 90 S. W. 608.

⁴¹ *Saltman v. Nesson*, 201 Mass. 534, 88 N. E. 3.

⁴² *Boardman v. Marshalltown Grocery Co.*, 105 Iowa, 445, 75 N. W. 343.

⁴³ *Kensington Elec. Co. v. Philadelphia*, 187 Pa. St. 446, 43 Wkly. N. C. 186, 41 Atl. 509.

ized for joint or partnership undertakings, should be sought at common law, not through mandamus proceedings.⁴⁴

§ 352. When Proper Remedy Is Quo Warranto and Not Mandamus.

Mandamus will not lie to compel a foreign corporation to perform an act which is a prerequisite to its right to do business in the State. The proper remedy is *quo warranto*, or the imposition of the penalty for doing business without complying with the law.⁴⁵

§ 353. When Remedy to Forfeit Franchise, and Not Mandamus, Is Proper.

In an action by the State for a writ of mandamus to compel a street railway company to resume operation of a portion of its line, which it had abandoned, it was held that no such obligation as could be enforced by mandamus by the State was imposed by the acceptance and construction of its line, under an ordinance of a city giving such company permission to construct and operate said lines; but that the remedy would be to forfeit the franchise to operate a branch in controversy where the operation of a part thereof was abandoned.⁴⁶

⁴⁴ *Lamphere v. Grand Lodge Ancient Order of U. W.*, 47 Mich. 429.

⁴⁵ *Secretary of State v. National Salt Co.*, 126 Mich. 644, 8 Det. L. N. 168, 86 N. W. 124.

⁴⁶ *San Antonio St. Ry. Co. v. State*, Elmendorf, 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, 6 Am. & Eng. R. Cas. (N. S.) 658, rev'g 38 S. W. 54. The court, per Gaines, C. J., said: "It is a well-settled doctrine that a corporation may be compelled by the writ of mandamus to perform a duty imposed by statute. The duty need not be express; it may be implied. Clearly, when it appears by fair implication from the terms of its charter, it is as imperative as if the obligation were expressed. But as to corporations quasi public in character—such, for example, as those chartered for the carriage of passengers and freight—there are decisions which hold that they owe certain duties to the public which they may be compelled to perform, although not enjoined by their charters, either in express terms or by specific implication. But we have been unable to discover that any well-defined rule has been laid down by the authorities by which we may determine in every case what implied duties are assumed by such a corporation by the acceptance of its charter. It has been held that in the absence of some direct statutory requirement a railroad company cannot be compelled

**§ 354. When Remedy in Equity and Not by Mandamus—
Injunction—Mandatory Injunction.**

Mandamus will not be granted to compel the secretary of a private corporation to record the transfer of certificates of stock

to establish and maintain a station at a particular point on its line, although it may be shown that the convenience of the public demands it. *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283; *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856. A contrary doctrine seems to have been acted upon in *State v. Republican Val. R. Co.*, 17 Neb. 647, 24 N. W. 329, and in *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857. It is one thing to hold that a company which has accepted a charter authorizing it to construct a line of railroad, with power to condemn property, and has constructed and is maintaining its line, may be compelled to so operate its line as reasonably to meet the necessities of the public; and, we think, it is quite a different one that a railroad company, by the acceptance of its charter, which simply makes it lawful to construct and maintain a railroad, assumes an obligation to construct." The court then considered a number of decisions upon this point and continued as follows: "The legislature, in creating a corporation, has the power to give it an option to do or not to do the acts which it is authorized to perform. On the other hand, it may impose upon the corporation, as the law of its creation, the obligation to exercise to their fullest extent the powers which are granted. In either case the proposed corporators may accept or not; and, in the latter, if they do accept, they may be compelled by mandamus to perform the duties so imposed. But to say that in granting a charter to do a public service there is no difference between making it lawful to do an act, and imposing it as an obligation to perform it, is to say that by reason of the public interest involved language is to have a different construction and effect from what it would have in statutes in general or in private contracts. Expressions may be found in the opinions of courts which countenance that doctrine, but we think there it is based upon an assumption that cannot be maintained upon sound principle. In legislating, the law-making power undertakes to determine what is to the interest of the public, and under the limitations of the constitution it is the sole judge of what will promote the public utility, and must be presumed to be capable of expressing its will in intelligible words. When, therefore, a corporation, whether quasi public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed. * * * We are of opinion also that the fact that the road has been constructed and operated, and that a part is now operated, makes no difference. Under the grant of a privilege to construct and maintain, if after acceptance it is permissive only to construct, it is not obligatory to maintain. But we do not hold that the company can against the will of the city, operate a part of its line, and not the whole. A privilege to establish

on the books of the company, as equity has jurisdiction to decree transfers, if an action at law does not afford an adequate remedy.⁴⁷ And where, owing to physical or other conditions existing at a point where a cross-over switch is located, the annoyance caused to the adjoining proprietor is peculiar and exceptional; and so injurious to the quiet enjoyment of his home, as to constitute an invasion of his property rights, he may then be entitled to equitable relief, but not to a writ of mandamus. Such private right could not be enforced, however, without establishing the absolute illegality of the structure at the point in question.⁴⁸ So where a complaint in mandamus charges that relator by a written contract with a natural gas company permitted such company to lay pipes over and upon his lands in consideration of such company's agreement to furnish the relator natural gas for domestic use, and asks the court to compel such company "to cease taking up and removing its pipe-line on the relator's farm, and to replace any part of the line taken up at the commencement of this suit, and to continue to furnish natural gas to the relator's farm dwelling according to the terms of a written contract granting appellee a right of way for its pipe-line across said farm," such complaint is not sufficient, since mandamus is not the proper remedy to compel such company "to cease taking up and removing its pipes," the proper remedy being injunction.⁴⁹ Again, where a Code⁵⁰ provides that a mandatory injunction may affirmatively direct the doing of the act required to be done, injunction, and not mandamus, is the proper remedy to compel a telephone company to install an instrument.⁵¹

an entire line of street railway may be granted when the privilege of constructing and operating a part only would not be, and for a failure to operate a part it would seem that the whole might be forfeited."

⁴⁷ *Clarke v. Hill*, 132 Mich. 434, 9 Det. L. N. 671, 93 N. W. 1044.

⁴⁸ *State ex rel. Howard v. Hartford St. Ry. Co.*, 76 Conn. 174, 56 Atl. 506.

⁴⁹ *State ex rel. Thiebaud v. Connersville Natural Gas Company*, 163 Ind. 563, 71 N. E. 483.

⁵⁰ Ky. Civ. Code Prac., § 271.

⁵¹ *Williams v. Maysville Telephone Co.*, 119 Ky. 33, 26 Ky. L. Rep. 945. In this case the fact that defendant telephone company furnished plaintiff's neighbors in the same square with telephones for three dollars per quarter,

§ 355. Mandamus—Enforcement of Private or Personal Rights—Contractual Relations.

As mandamus is a discretionary writ it will not usually lie to settle the controversies of private corporations where the facts are not important on public grounds, or would not justify the interference of the court if corporate authority did not exist.⁵² Nor does this writ lie to enforce merely private or personal rights, or contractual duties. Its proper function is to enforce duties growing out of public relations, or imposed by without requiring them to contract to keep the phones a year, did not entitle plaintiff to compel defendant to furnish him a phone for the same price without a yearly contract, without showing that the conditions were the same. In this case the court, per Nunn, J., said: "It is conceded by appellee's counsel that appellee is a common carrier, a public service corporation, and, as such, is subject to the laws governing and controlling such corporations. It is self-evident that a corporation engaged in a business affected by a public interest may prescribe reasonable rules and charges for conducting its business. And when the charges are not fixed by legislative enactment (as in the case at bar) the charges may be fixed by the corporation, and the only limitations are that the charges must be reasonable, and be the same to all persons under the same or like circumstances and conditions. There must not be, in the service or charge, any discrimination or partiality. Tested by these principles, we are of the opinion that the petition did not state a cause for action. Especially it did not authorize the court to grant a mandamus to compel appellee to place a telephone in appellant's residence. Mandamus was not the proper remedy. This writ is defined by § 477 of the Civil Code of Practice, as follows: 'The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and it is granted on the motion of the party aggrieved, or of the commonwealth when the public interest is affected.' The agents and servants in charge of appellee's telephone business were and are not 'executive or ministerial officers' in the sense and meaning of this section of the Code. If appellant's petition had been otherwise sufficient under his prayer 'for all proper and general relief,' the court should have granted him a mandatory injunction, as provided in § 271, Civ. Code Prac., which provides: 'When a mandatory injunction shall be granted, the order or judgment may affirmatively direct the party enjoined to do the act or thing required to be done.' This, however, is a harsh and extreme remedy, and should never be resorted to or granted except it be made to appear clearly that the party demanding the remedy has the legal right to have the act done, and that he has no other adequate remedy at law to obtain redress."

⁵² *Lamphere v. Grand Lodge Ancient Order of U. W.*, 47 Mich. 429.

statute, or in some respect involving a trust or official duty.⁵³ Again, duties imposed on a corporation, not by virtue of express law, nor by the conditions of its charter, but arising wholly out of contract relations, will not be enforced by mandamus, since the use of such writ is limited to the enforcement of obligations imposed by law. Where the duties of a corporation, or of its trustees, grow out of or result from matters of contract, writs of mandate will not lie against the corporation or its trustees, either in their corporate capacity or as individuals, to compel the performance of the contract, but the party aggrieved will be left to the ordinary remedies, either at law or in equity.⁵⁴ So the writ will not lie to annul a contract for public printing.⁵⁵ The doctrine that mandamus will not lie to compel a private corporation to perform its obligations resting solely on contract with an individual has been applied to the contract of a medical college to grant its diploma to one completing the course of instruction and complying with certain conditions.⁵⁶

⁵³ *Richmond Ry. & Electric Co. v. Brown*, 97 Va. 26, 1 Va. S. C. Rep. 213, 32 S. E. 775.

⁵⁴ *Poyser v. The Trustees of Salem Church*, 114 Ind. 389, 396, 16 N. E. 808, citing *State ex rel. v. Zanesville, etc.*, T. P. Co., 16 Ohio St. 308; *State ex rel. v. Patterson, etc.*, R. R. Co., 43 N. J. L. 505; *State v. Republican River Bridge Co.*, 20 Kans. 404; *People ex rel. v. Dulaney*, 96 Ill. 503; *High on Ex. Leg. Rem.*, § 321. In the principal case the trustees of a Methodist Church corporation solicited subscriptions to a building fund. To induce persons who were not members of the religious denomination represented by them to subscribe to such fund, it was stipulated in the subscription papers, with the consent of the corporation, that the house to be erected should be free to all orthodox denominations when not occupied by the Methodists. Relying upon this stipulation, members of other denominations subscribed and paid various sums of money. Some time after the completion of the building, the Methodist corporation refused to permit other denominations to use the house. Complaint was by subscribers to the building fund, asking that a writ of mandate may issue to compel the trustees of the Methodist Church to designate a time when another denomination may occupy the building. It was held, that the duty, the performance of which is sought to be compelled, is not one "resulting from an office, trust, or station," and that, under § 1168, R. St. 1881, mandate would not lie.

⁵⁵ *Capital Printing Co. v. Hoey*, 124 N. C. 767, 33 S. E. 160.

⁵⁶ *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 116 Am. St. Rep. 21, 106 N. W. 116.

So in a late Michigan case mandamus was brought to compel a college to receive relators as students; an order was made granting the writ and certiorari was brought by the respondent and it was held that mandamus would not be granted to compel a private corporation to perform its obligations resting in contract with an individual.⁵⁷

But in a Maryland case it is decided that mandamus lies to compel a university which has a law school to reinstate a student which it has wrongfully dismissed from said school, without notice and in violation of the contract between the parties.⁵⁸

Again, where a corporation undertakes to operate a railroad franchise it assumes all the duties and obligations which spring by law from the character of its business and from the customs

⁵⁷ *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 16 Det. L. N. 56, 120 N. W. 589. The court, per Ostrander, J., said: "There is no good reason why the law should not recognize, as growing out of these relations, a right of relators resting in contract to be continued as students by the respondent. It is the general rule that mandamus does not lie to compel a private corporation to perform its obligations resting in contract with an individual. We are referred to no decision of this court recognizing any other rule. A case in which the rule was enforced by denying the writ to one who had completed a course in an incorporated college and had been refused a diploma is *State ex rel. Burg v. Milwaukee Medical College*, 128 Wis. 7, 106 N. W. 116, 116 Am. St. Rep. 21. In the opinion in that case and in the motion for a rehearing many authorities are cited, among them *Clarke v. Hill*, 132 Mich. 434, 93 N. W. 1044. The writ was held to be the only adequate remedy in *Baltimore University v. Colton*, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108, and in *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun, 107, 14 N. Y. Supp. 490; *Id.*, 128 N. Y. 621, 28 N. E. 253. It cannot be said that relators are members of an incorporated society, and have been wrongfully deprived of the privileges of members, which is the ground of decision in *Baltimore University v. Colton*, *supra*. It may be said, perhaps, that the New York decision is rested upon the notion that relator had acquired a status, evidence of which, in the form of a degree, was arbitrarily refused. The Court of Appeals delivered no opinion. If mere expedition in securing some remedy is to be made the test, it may be said there is no other adequate remedy for relators. And, if enforcement of the obligations of private corporations by mandamus is to be entered upon by the courts, we know of no rule by which it can be determined in what cases the writ should be refused. The apparent hardship of a particular situation is not a good reason for departing from the rule."

⁵⁸ *Baltimore University v. Colton*, 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108.

incidental to it. It tenders a continuing offer to the general public that it will perform these duties for the benefit of each and every one of them when demanded at its hands. When any member of the public makes a demand upon it under such general offer there immediately results a civil obligation on the part of the company in favor of the party making the demand, enforceable in the name of such party through the usual remedies by which contracts are enforced. The party seeking the enforcement of the obligation by mandamus cannot be driven by the corporation to an action for damages, nor can it by the payment of money, leave unperformed its specific affirmative legal duty.⁵⁹ Where a Code⁶⁰ provides that mandamus may issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; and also⁶¹ that the writ must be issued in all cases where there is not a plain, speedy and adequate remedy at law, it is held that mandamus is the proper remedy to compel a city to levy a special tax to pay ascertained water rentals due under a valid contract for a water supply, which the city had repudiated. And where a city repudiates a contract with a water company providing for payment of hydrant rentals semi-annually, but still uses the water furnished by the company, and insists that the supply be continued regardless of the contract, a command in a writ of mandamus, that the city levy sufficient taxes to pay, not only the six months' water rentals already due, but also those that will become due for the remaining six months of the year, is proper.⁶²

In a Louisiana case the relator applied for a writ of mandamus to compel the city engineer to furnish its lines and levels for the construction of its railroad through neutral ground of a certain named avenue between certain named streets. The relator claimed that it owned a railroad franchise and that sub-

⁵⁹ *Cumberland Teleph. & Teleg. Co. v. Morgan's L. & T. Ry. Co.*, 51 La. Ann. 29, 72 Am. St. Rep. 442, 24 So. 803.

⁶⁰ Mont. Code Civ. Proc., 1895, § 1961.

⁶¹ *Id.*, § 1962.

⁶² *Syllabus in State ex rel. Great Falls Water Works v. Great Falls City Council*, 19 Mont. 518, 49 Pac. 15.

sequently the city council passed an ordinance, under which certain changes were made in the matter of the line of the railroad; the relator claimed that the whole road had been completed except that portion to which the writ of mandamus related, and relator was anxious to connect its line so as to operate from terminus to terminus. The respondent's answer to the preliminary order issued on application for the mandamus, was that it was not his duty to deliver to relator lines and levels, because the amending ordinance under which the relator claimed a franchise had been repealed by the city council, and that if it had not been repealed relator's allegations were vague and indefinite and did not indicate upon what neutral grounds to establish the lines and levels and did not designate upon what part of the neutral ground the tracks were to be laid; and also, that the relator had no contract with the city and held no franchise from it, and that the alleged contract was void. It was not disputed, as a fact, that the relator had constructed its line of road as alleged in its petition. It was also a fact that relator had accepted the terms and conditions of the ordinance under which it had accepted its franchise; that ordinance was, however, repealed. It was held that there was an existing contract between the city and the corporation relator; that it was no longer within the power of the city, after compliance by relator with its terms, to treat said contract as a nullity by repealing the prior ordinance, as by its execution the contract acquired a validity to which effect should be given until it should be regularly annulled contradictorily with the party in interest; that it was incumbent upon the surveyor, under the terms of the contract between the relator and the city, to furnish the lines and levels of the contemplated road; that he could not in law decline to act before he was stopped by the legal action of the constituted authorities; and that mandamus would lie to compel the performance by an officer of duties purely ministerial.⁶³

⁶³ State ex rel. Crescent City Rd. Co. v. City Engineer, 49 La. Ann. 676, 21 So. 724, McEnery, J., dissenting. See also on last point State ex rel. Baltimore, Canton & P. B. Ry. Co. v. Latrobe, 81 Md. 222, 233, 31 Atl. 788.

§ 356. When Writ Lies to Enforce Discretionary or Ministerial Duties.

When the duty imposed is strictly a ministerial one, is absolute and imperative, and in its discharge requires the exercise of neither official discretion nor judgment, mandamus will lie to enforce its performance.⁶⁴ And such a writ may issue to compel public officers to exercise discretion.⁶⁵ But though the discretion of a Secretary of State may extend to matters of form, still it does not extend to a question of merits in an application to him to file and record articles of incorporation showing compliance with the laws, the proper fees being tendered.⁶⁶ Where a franchise was granted to a telephone company to extend its lines upon the condition that the location of the poles should be designated by the commissioner of public works, it was decided that though the commissioner refused and his refusal was purely arbitrary and unjustified, the company was not justified in taking matters into its own hands, even though conforming to the recognized method of erecting such poles, but that the legal course was open to the appellant to compel the commissioner's action and that mandamus would lie to compel the commissioner to act, as that was the proper remedy to compel the exercise of official discretion or judgment.⁶⁷ If county commissioners have improperly assessed for

⁶⁴ *State ex rel. Baltimore, Canton & P. B. Ry. Co. v. Latrobe*, 81 Md. 222, 31 Atl. 788.

Examine the following cases:

Alabama: *Ramagnano v. Crook*, 85 Ala. 226, 3 So. 845.

Kentucky: *Shine v. Kentucky C. R. Co.*, 85 Ky. 177, 3 S. W. 18.

Louisiana: *State ex rel. Johnson v. Rightor*, 40 La. Ann. 852, 5 So. 416.

Missouri: *State ex rel. Hathaway v. Board of Health*, 103 Mo. 22, 15 S. W. 322; *State v. Cramer*, 96 Mo. 75, 8 S. W. 788.

Nebraska: *State ex rel. Hershisher v. Kincaid*, 23 Neb. 641, 37 N. W. 612.

Pennsylvania: *Commonwealth v. McLaughlin*, 120 Pa. St. 518, 21 W. N. C. 478, 14 Atl. 377.

West Virginia: *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. 552.

⁶⁵ *Croasman v. Kincaid*, 31 Ore. 445, 49 Pac. 764.

⁶⁶ *State ex rel. Steubenville Gas & Elec. Co. v. Taylor*, 55 Ohio St. 61, 35 Ohio L. J. 384, 44 N. E. 513, 4 Am. & Eng. Corp. Cas. (N. S.) 470.

⁶⁷ *St. Paul, City of, v. Freedy*, 86 Minn. 350, 90 N. W. 781, 8 Am. Elec. Cas. 29, citing *State v. Teal*, 72 Minn. 37, 74 N. W. 1024.

taxation machinery as being part of the real estate of a corporation, a writ of mandamus is the proper remedy to cause them to strike from their books the illegal assessment.⁶⁸

§ 357. When Writ Does Not Lie to Enforce Discretionary Duties.

Mandamus will not lie to compel the exercise of discretion in a particular manner.⁶⁹ Whenever the performance of a duty is dependent upon the exercise of judgment and discretion on the part of the person to whom the performance of that duty is exclusively assigned, that judgment will not be interfered with or controlled by mandamus.⁷⁰ Mandamus cannot be sustained against a street commissioner to compel him to issue a permit to excavate the city streets for a subway, where the relator corporation has no vested right so to place its wires.⁷¹ Nor does such a writ lie to compel a board of aldermen to designate locations for electric light fixtures in streets where such board has in such matters discretionary powers under the statute.⁷²

§ 358. When Mandamus Lies and Does Not Lie to Compel

⁶⁸ *Anne Arundel County (County Commissioners of Anne Arundel County) v. Baltimore Sugar Ref. Co.*, 99 Md. 481, 58 Atl. 211. The Code, Art. 81, § 184, providing for the filing of a petition to correct an improper assessment was held not applicable as it afforded no remedy which would forbid resort to mandamus; and, besides, that section was simply a part of the machinery of an assessment under the act of 1896, and having been completely executed was without effect.

⁶⁹ *Shipman v. State Live Stock Sanitary Commission*, 115 Mich. 488, 4 Det. L. N. 954, 73 N. W. 817.

⁷⁰ *State ex rel. Baltimore, Canton & P. B. Ry. Co. v. Latrobe*, 81 Md. 222, 233, 31 Atl. 788. See also *State ex rel. Crescent City Rd. Co. v. City Engineer*, 49 La. Ann. 676, 21 So. 724.

⁷¹ *State ex rel. Laclede Gas Light Co. v. Murphy*, 130 Mo. 10, 31 S. W. 594, 5 Am. Elec. Cas. 71, s. c., 170 U. S. 78, 18 Sup. Ct. 505, 42 L. ed. 955, where the questions of reasonable police regulations as to public safety and convenience in placing electrical wires; impairment of obligation of contract; offer to comply with terms of ordinance; nonobligation to determine in advance what might or might not be lawful requirements; and Federal question, are all considered.

⁷² *Suburban Light & Power Co. v. Board of Alderman of Boston*, 153 Mass. 200, 3 Am. Elec. Cas. 80, 81, 26 N. E. 447.

Filing Articles of Incorporation and Certificates—Issuance of Certificates.

Mandamus lies to compel the Secretary of State to file and record articles of incorporation showing compliance with the laws upon a tender of the proper fees.¹ Such a writ also lies to compel the Secretary of State to file an amended certificate of a corporation where it proposes to extend its operations to the production of electric light, heat and power.² So an injunction writ may be granted to a corporation to compel the Secretary of State to file in the office a certificate designating an agent to receive process as required by a provision of the Code of the State where it appears that the plaintiff has fully complied with the State statutes relative to foreign insurance companies and has filed with the State Auditor all papers and needed notes and statements required by the Code, relating to stock and mutual insurance corporations.³ As mandamus is, however, a discretionary writ it will not issue to enable the relator to do an illegal act, thus where the relator is a domestic corporation and mutual benefit association and it has been refused a certificate by the respondent, the State commissioner, upon the ground that the relator is not doing business in conformity to law, that is, it is not complying with the law in that respect, the court will not aid it in its intended violation by the discretionary writ of mandamus.⁴ Under an Ohio decision it is held that the insurance commissioner cannot be compelled by

¹ State ex rel. Stebbins Gas & Elec. Co. v. Taylor, 55 Ohio St. 61, 35 Ohio L. J. 34, 44 N. E. 513, 4 Am. & Eng. Corp. Cas. (N. S.) 470.

² People ex rel. Municipal Gas Co. v. Rice, 138 N. Y. 151, 51 N. Y. St. Rep. 553, 33 N. E. 546.

³ State ex rel. Fidelity & Casualty Co. v. Rotwitt, 18 Mont. 92, 44 Pac. 457.

⁴ Citizens' Life Ins. Co. v. Commissioner of Ins., 128 Mich. 85, 87 N. W. 126, 30 Ins. L. J. 919. Under 2 Comp. Laws Mich., § 7517, providing that, on the filing of the annual statement of a benefit association, if the insurance commissioner shall find that the association is still organized and doing business conformably to law, he shall issue his certificate authorizing it to continue the business, the commissioner may withhold the certificate on finding that the association is allowing rebates in violation of the law; and this though the following section provides for the institution of proceedings by the Attorney-General in such case. *Id.*

mandamus to issue a certificate to a company organized in a State where Ohio corporations were not permitted to carry on business on the same basis substantially as in Ohio.⁷⁷

§ 359. When Mandamus Lies—Election of Corporate Officers.

A railway company will be subject to the laws of a State, which provide that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit, and such a mode of electing may be enforced by mandamus.⁷⁸

§ 360. When Mandamus Lies to Compel Order Revoking Charter to Be Vacated.

Where a benefit association is organized under the laws of Michigan, and its members are insured by and under the authority of the State and by no other right, mandamus lies to compel its officers to vacate an order revoking the charter of a subordinate lodge without cause and without a hearing.⁷⁹

§ 361. When Mandamus Lies to Reinstate Member.

A mandamus will issue to compel the recognition of the relator as a member of a subordinate lodge, which is a domestic corporation, where such member stands suspended and thereby loses his insurance because of his refusal to pay an assessment, for which he is not liable, made under the orders of the supreme lodge of the order, which is a foreign corporation not subject to

⁷⁷ State v. Moore, 39 Ohio St. 486.

⁷⁸ Cross v. West Virginia Central & Pa. Ry. Co., 35 W. Va. 174, 12 S. E. 1071.

⁷⁹ Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

the jurisdiction of the court.⁸⁰ An irregular removal of a member of a board of governors of an association formed under the provisions of a statute entitled, "An act to provide for the incorporation of associations for the erection and maintenance of hospitals, infirmaries, orphanages, asylums, and other charitable institutions,"⁸¹ will warrant the use of the writ of mandamus to restore him to his corporate rights in said board.⁸²

§ 362. Mandamus Lies to Enforce Right of Inspection of Books of Corporation.

Under a Code⁸³ which provides that full accounts shall be kept of the transactions of the directors of every corporation, "which shall be open at all times to the inspection of the stockholders or members," a stockholder is entitled to make a personal inspection of the books of the corporation and cannot be required to accept anything else as a substitute for that; and mandamus is a proper remedy to enforce this right of inspection at reasonable times, if it be refused by the officers of the corporation. The fact that the stockholder asking to inspect the books is a rival in business of the corporation, and may use the information so obtained to the injury of the corporation, is no ground for refusing the writ, but it would be denied if his pur-

⁸⁰ *Lamphere v. Grand Lodge of the Ancient Order of U. W.*, 47 Mich 429.

When mandamus will lie to reinstate expelled members see *State ex rel. Vannata v. Smith*, 61 N. J. L. 188, 38 Atl. 811; *Sibley v. Carteret Club*, 4 N. J. L. 295; *People v. St. Francis Benev. Soc.*, 24 How. Pr. (N. Y.) 216; *People v. Medical Soc. of E. N.* 24 Barb. (N. Y.) 570; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Weis v. Musical Protective Union (Pa.)*, 29 Pitts. L. J. (N. S.) 1; *Manning v. San Antonio Club*, 63 Tex. 166. See *Joyce on Insurance*, § 3520.

When mandamus will not lie to reinstate expelled members, see *Fraternal Mystic Circle v. State*, 39 Ohio L. J. 43, 48 N. E. 940.

⁸¹ N. J. Act, approved March 9, 1877, Gen. Stat., p. 1686.

⁸² *Welch v. Passaic Hospital*, 59 N. J. L. 142, 36 Atl. 702. Before such member can be removed from his office, there must be an inquiry and a determination of the neglect of duties imposed upon such member by the constitution and by-laws of such association, and this inquiry and determination can only be made upon notice to him, and an opportunity for him to be heard in his defense. *Id.*

⁸³ Md. Code, Art. 23, § 5.

pose were improper or unlawful. So an instruction to the jury that under the pleadings and evidence in the case the plaintiff is not entitled to recover, is too general, but a judgment will not be reversed for error in granting such an instruction if the court is satisfied that there is no ground upon which a plaintiff could obtain a judgment in a second trial.⁸⁴ So where a constitutional provision,⁸⁵ secures to shareholders of the capital stock of corporations the right to inspect the books of such companies, if the right of inspection is denied the writ of mandamus will lie to enforce it. By "public inspection," as used in such constitution is meant, not the inspection of the idle, the impertinent or the curious—those without an interest to subserve or protect—but the inspection by those with a laudable object to accomplish, or a real and actual interest upon which is predicated the request for information disclosed by the books.⁸⁶ Again, where the tax laws of the State make it the duty of the county assessor to assess all property that has been omitted from taxation, a writ of mandate will lie to compel a building and loan association to permit the county assessor to examine its books for the purpose of determining whether any of the stock of such association has been omitted from taxation.⁸⁷

§ 363. Mandamus Lies to Compel Surrender of Corporation's Books, Seal and Papers.

Mandamus lies to compel the surrender and delivery of the corporation books to the person or persons entitled to their custody.⁸⁸ And that writ is the proper remedy to compel the delivery of the seal, books and papers of a corporation by a secretary who refuses to deliver them to his successor in office,

⁸⁴ *Weihenmeyer v. Bitner*, 88 Md. 325, 45 L. R. A. 446.

⁸⁵ La. Const., Art. 245.

⁸⁶ *Bourdette, State ex rel. v. New Orleans Gas Light Co.*, 49 La. Ann. 1556, 22 So. 815.

⁸⁷ *State ex rel. Morgan, Assessor, v. Real Estate Bldg. & Loan Assoc.*, 151 Ind. 502, 51 N. E. 1061.

⁸⁸ *State ex rel. Immanuel Presby. Church v. Riedy*, 59 La. Ann. 274, 23 So. 327.

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when it appears that he does not hold them under any color of right to the office.⁸⁹

§ 364. **Mandamus to Compel Transfer of Certificates of Stock—Lost Certificates.**

Where certificates of stock have been lost mandamus will issue to compel a corporation to transfer on its books the original shares of stock, standing in another's name, and to issue and deliver to the owner new certificates in his name.⁹⁰

§ 365. **Mandamus to Control Rates, Charges and Fares—Discrimination.**

Mandamus lies to compel a water company to fix reasonable rate.⁹¹ So an electric light company cannot discriminate in furnishing electric light at a reasonable rate to consumers, even though it is not obligated to furnish service to all its patrons upon an absolute equality in the absence of a statutory enactment to that effect. So where it appeared that such a company furnished transformers free to all of its patrons it was held that a refusal to furnish light to a certain person unless he would pay the cost of a transformer was unjust discrimination and that mandamus would issue to compel the furnishing by the company of electricity for lighting purposes. It was also decided that the rights of the parties were not affected by the fact that the company wired the houses of its other patrons, on

⁸⁹ State ex rel. v. Guertin, 106 Minn. 248, 119 N. W. 43.

When mandamus will not lie to compel surrender of books, etc., of charitable association. State ex rel. Jones v. Williams, 54 Neb. 154, 74 N. W. 396.

⁹⁰ State ex rel. Benedict v. Mineral & Land Improvement Co., 108 La. 24, 32 So. 174.

The oath for a mandamus taken by the attorney to compel the transfer, on the books of the company, of the original shares of stock and to deliver certificates in his name, was prima facie legal and sufficient, particularly in the absence of all objection to it in the court of the first instance. The objection was only raised arguendo on appeal. State ex rel. Benedict v. Mineral & Land Improvement Co., 108 La. 24, 32 So. 174.

⁹¹ People ex rel. Brush v. New York Suburban Water Co., 56 N. Y. Supp. 364, 38 App. Div. 413.

which work it made a large profit, while the house of the proposed patron was wired by other parties.⁹²

In Nebraska mandamus was brought to compel a telephone company to furnish an instrument and telephonic service in relator's office at a price less than that demanded by the company, a peremptory writ was obtained commanding the company to furnish such instrument and service at the relator's price; this judgment was reversed and the proceedings dismissed. Such a public service corporation is charged with certain public duties, among which are to furnish for a reasonable compensation to any citizen a telephone and telephonic service, and to charge each patron for the service rendered the same price it charges every other patron for the same service under substantially the same or similar conditions; but the power, the jurisdiction, to determine what compensation a public service corporation may exact for services to be rendered by it is a legislative and not a judicial function. The jurisdiction of the court is also limited to declaring what the law is, and they are forbidden by the Constitution to perform legislative functions.⁹³

⁹² *Snell v. Clinton Electric Light Co.*, 196 Ill. 626, 63 N. E. 1082, rev'g 95 Ill. App. 552.

⁹³ *Nebraska Telephone Co. v. State ex rel. Yeiser*, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171. The court in this case, per Ragan, C., said: "The respondent in the case at bar is a private corporation. By permission of the city of Omaha it is occupying the streets and alleys of that municipality with its poles, wires, and other appliances used in the conduct of the business in which it is engaged. It is a common carrier of news and intelligence. It is a corporation affected with a public use—a public service corporation—and as such it has assumed and is charged with certain public duties, among which are to furnish for a reasonable compensation to any inhabitant of the city of Omaha a telephone and telephonic service, and to charge each of its patrons for the service rendered or to be rendered the same price it charges every other patron for the same service under substantially the same or similar conditions. *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237; *American Water Works v. State*, 46 Neb. 194, 64 N. W. 711; *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 62 N. W. 506. But the judgment under consideration determines not only that the telephone company shall render for the relator the service required by him, but fixes and determines as well what compensation the relator shall pay to the respondent for such service. This judgment, then, in effect determines, de-

Under a Minnesota statute⁹⁴ the determination of the Railroad and Warehouse Commission as to what are equal and reasonable fares and rates for the transportation of persons and

cides, and fixes the charges which the respondent may lawfully exact for services to be rendered in future by it to its patrons. Where a public service corporation has performed a service and sues to recover therefor, in the absence of an express contract for a specific compensation the measure of its damages is a reasonable compensation for the services performed; and whether the compensation which it demands is reasonable is a judicial question. Where the legislature has fixed the compensation which a public service corporation may exact for the performance of a service, then the reasonableness of the compensation so fixed by the legislature—that is, whether the limiting of the corporation to the compensation fixed by the statute would result in a confiscation of the corporation's property—is a judicial question. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819. But the power—the jurisdiction—to determine what compensation a public service corporation may exact for service to be rendered by it we understand to be a legislative, and not a judicial function. In the case at bar the respondent had not performed services, and sued to recover the compensation. If it had, the relator might have defended upon the ground that the compensation demanded was unreasonable, and the court would have had jurisdiction to determine the question. The case at bar is not a suit by the relator for damages against the respondent for its neglect and refusal to render to him for a reasonable compensation the service he demanded. In the case at bar the relator did not pay the compensation alleged to be exorbitant, which the respondent demanded, and then sue to recover back the excess. Had he done so it may be that the court would have had the power to determine whether the compensation actually demanded and received by the respondent was unreasonable. But here the court determines that the respondent shall perform for the relator a specific service for three months for a specific sum of money. This, in effect, was a determination by the court that three dollars per month was a reasonable compensation for the services required to be rendered by the respondent, and a fixing of the compensation for such service at that price for the future.

“We think the history of the legislation of the entire country shows that the power to determine what compensation public service corporations may demand for their services is a legislative function, and not a judicial one. If the courts may determine what compensation a telephone company may exact for a service to be rendered in the future, we know of no reason why the courts may not determine the freight and passenger rates which the railway corporations of the State may charge for the transportation of freight and passengers; and yet the framers of our Constitution recognised that this power to fix the compensation of public service corporations was a legislative one, as by that instrument they expressly confer upon the

⁹⁴ Laws, 1887, c. 10, § 8.

property by a railway company is conclusive, and, in proceedings by mandamus to compel compliance with the tariff of rates recommended and published by them, no issue can be raised or inquiry had on that question.⁹⁵

§ 366. When Mandamus Lies Against Common Carrier, Generally.

When a common carrier refuses absolutely to recognize a certain duty which is claimed to rest upon it as such and to perform it under any terms and conditions, the party claiming the existence of such duty may test that fact by mandamus, leaving

legislature the power from time to time to pass laws establishing reasonable rates or charges for the transportation of passengers and freight. Section 4, Art. 11, Const. And it is evident that the legislature has acted upon the theory that this power to fix the compensation of public service corporations is one vested in it by the Constitution. This is evident from its creation of the board of transportation, and the powers conferred upon that board; and as late as 1897 the legislature conferred authority upon the mayor and council of cities of the metropolitan class to fix and determine by ordinance what compensation telephone companies doing business within such cities might charge and exact for services rendered, or to be rendered by them. Comp. St., 1897, c. 12a, § 131. Fixing a compensation which public service corporations may charge for services to be rendered by them is legislating; it is lawmaking. The power of the courts is limited to declaring what the law is, and they are precluded by the Constitution from performing legislative functions; and, though the courts of the land have from time to time declared laws fixing the compensation which public service corporations might charge for services to be rendered by them void because the compensation fixed by the law was unreasonable in that the enforcement of the statute would confiscate the corporation's property, and thereby deprive it of its property without due process of law, we know of no court which has ever claimed that it had the authority to determine what compensation would be a reasonable one for a service to be performed by such corporation. The relator must address himself for relief from the grievances of which he complains to the legislative power of the State,—to the legislature itself, to the board of transportation, to the mayor and council of the city of Omaha. If the compensation now charged and exacted by the telephone companies of the State is exorbitant and unreasonable, we must presume that the board of transportation, the mayor and council of the city of Omaha, and the legislature of the State, one and all of them, will investigate the matter and prescribe a scale of reasonable charges. The judgment of the district court is reversed, and the proceeding dismissed."

⁹⁵ State ex rel. Railroad & Warehouse Commission v. Chicago, Milwaukee & St. Paul Ry. Co., 38 Minn. 281, 37 N. W. 782.

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open the question as to the specific terms and conditions upon which it is to be performed.⁹⁶ Mandamus also lies to compel the running of passenger cars separate from freight trains.⁹⁷

§ 367. **Mandamus—Limitation of Remedy Under Act to Regulate Commerce—Interstate Commerce Commission.**

Under the act to regulate commerce ⁹⁸ the remedy of mandamus is limited to compelling the performance of duties which are either so plain as not to require a prerequisite exertion of power by the Interstate Commerce Commission, or which plainly arise from the obligatory force given by the statute to existing orders rendered by the commission within the lawful scope of its authority.⁹⁹

§ 368. **When Mandamus Lies and Does Not Lie Against Railroad Company.**

In an action in mandamus to compel a railway company to furnish cars for a shipper, the proof established that the relator desired to ship his hay in carload lots; that he had repeatedly requested the carrier to furnish him cars for said purpose, and that it had failed to do so. No reasonable excuse was shown for such conduct. It was held, that a peremptory writ of mandamus in favor of the shipper and against said corporation was proper.¹ Mandamus will not lie to compel a railroad company

⁹⁶ *Cumberland Teleph. & Teleg. Co. v. Morgan's L. & S. Ry. Co.*, 51 La. Ann. 29, 72 Am. St. Rep. 442, 24 So. 803.

⁹⁷ *People ex rel. Cantrell v. St. Louis, A. & T. H. Rd. Co.*, 176 Ill. 512, 52 N. E. 292, aff'g 45 N. E. 824, 35 L. R. A. 656.

⁹⁸ Section 23, although added thereto in 1889, is construed in the light of § 15, as amended in 1906.

⁹⁹ *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. ed. —, 30 Sup. Ct. —. Petition in mandamus by a shipper averring discrimination in distribution of coal cars by the Baltimore & Ohio Railroad dismissed because the matter had not been first submitted to the Interstate Commerce Commission.

¹ *State v. Chicago & Northwestern R. Co.*, 83 Neb. 524, 120 N. W. 163. It was also held in this case that chap. 90, of the Laws of Nebraska, 1907, will not in every instance afford a shipper an adequate remedy against a railway company that unlawfully neglects and refuses to furnish cars for the transportation of his goods and chattels. The court, per Root, J., said:

to build a station at a particular place unless there is a specific duty, imposed by statute, to do so, and clear proof of a breach of that duty.² Where, in case of a reorganized corporation, neither the charter nor the general law required the original company or requires the new company to maintain and operate a branch railroad into a certain city said corporation is within the rule that a writ of mandamus can only be used to enforce duties and obligations clearly imposed by the charter or the general law. So "where the line of railway, taken as a whole, cannot be profitably maintained; where its operation when discreetly and economically managed, is attended with loss, it is difficult to perceive how a court can, by mandamus or otherwise, compel its operation to be continued."³ A writ of mandamus commanding railroad companies to construct a viaduct across their tracks, which contains no plans or specifications of the work to be done, cannot be sustained. And, where a viaduct is to be built across the tracks of several railroad companies and the tracks are so situated as to require joint work in constructing the viaduct across some of the tracks, mandamus is not a proper remedy to compel the railroad companies to construct the viaduct, but all the companies should be made

"Independent of the commission law or any other special statute, it was defendant's duty to furnish reasonably adequate provisions for the transportation of freight offered it for shipment over its railway, and to serve its patrons without discrimination. *State v. Chicago, Burlington & Quincy Rd. Co.*, 71 Neb. 593. And the courts will compel by mandamus the discharge of that duty in a proper case. *State v. Chicago, B. & Q. R. Co.*, supra. Any other remedy is not adequate, unless it will furnish the aggrieved party relief upon the very subject-matter of his application. *State v. Stearns*, 11 Neb. 104; *Hopkins v. State*, 64 Neb. 10; *Fremont v. Crippen*, 10 Cal. 211; *Babcock v. Goodrich*, 47 Cal. 488. In cases like the one at bar proceedings before the commission will not afford that relief. The order, if made by the commission, is simply a step incident to an action in the district court, which may be anticipated and restrained by the carrier for an indefinite time by an action in a court distant from the residence of the complainant."

² *Northern Pacific Rd. Co. v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092; *State ex rel. Smart v. Kansas City, S. & G. R. Co.*, 51 La. Ann. 200, 25 So. 126.

³ *Sherwood v. Atlantic & Danville Ry. Co.*, 94 Va. 291, 306, 26 S. E. 943, 6 Am. & Eng. R. Cas. (N. S.) 670, per Keith, P.

parties to one equitable action wherein one decree could designate what part of the viaduct should be built jointly and the portion of the expense to be borne by each company, and also what part should be separately constructed by the different companies.⁴ If the charter of a railroad company requires it to establish a terminus of the road at one of two points to be selected by it, the obligation imposed by the charter is satisfied by the construction and maintenance of such terminus at either of the points prescribed, and the purchaser of said railroad under foreclosure proceedings cannot be compelled by mandamus to establish a terminus at the other point, although such other point may, at one time, have been used as such terminus under a contract with the original company.⁵

§ 369. When Mandamus Lies and Does Not Lie Against Street Railroad Company.

Mandamus lies to compel the operation of a street railway company where it attempts to discontinue an existing service.⁶ Mandamus is the proper remedy to compel a street railway company to perform its duty to maintain and operate its road in conformity with the provisions of its grant.⁷ Mandamus may also issue to compel the issuance of a transfer over the line of a street railway.⁸ In Connecticut the statute⁹ provides that the mayor and common council of each city shall have, in the first instance, exclusive control over the placing of street railway tracks in the city streets, and of changes of grade of such railway, and if any railway company shall fail to obey their orders in those respects they "may proceed by mandamus to

⁴ *Burlington & Colorado Ry. Co. v. People*, 20 Colo. App. 181, 77 Pac. 1026.

⁵ *Sherwood v. Atlantic & Danville Ry. Co.*, 94 Va. 291, 26 S. E. 943, 6 Am. & Eng. R. Cas. (N. S.) 670.

⁶ *State ex rel. Grinsfelder v. Spokane Street R. Co.*, 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515.

⁷ *Potwin Place, City of, v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; *State ex rel. Bridgeton v. Bridgeton & M. Tract. Co.*, 63 N. J. L. 592, 43 Atl. 715.

⁸ *Richmond Ry. & Electric Co. v. Brown*, 97 Va. 26, 32 S. E. 775, 1 Va. S. C. Rep. 213.

⁹ Gen. Stat., § 3824 (see Pub. Acts of 1907, p. 806, ch. 219).

compel such company, at its own expense, to carry out such orders." Such writs have been frequently issued.¹⁰ In a mandamus application brought by the State, on relation of the attorney for the board of railroad commissioners, to require a street railway company to construct a subway beneath the tracks of a railroad a peremptory writ was awarded; in such a case the city is not a necessary party.¹¹ Mandamus will not, however, be granted to compel a street railway company to keep its cars running over the whole of each line during the entire year.¹²

§ 370. When Street Railway Company Is and Is Not Entitled to Mandamus.

Where an ordinance of a city provided that no person should, under any pretext, dig up any of the streets of the city without having first obtained a written permit therefor from the city commissioner, approved by the mayor; it was held, that if a person or corporation is duly empowered by ordinance or legislative enactment to do an act involving such digging up of streets, as, for instance, to lay a street railway, neither the mayor nor the city commissioner can prevent the performance of that act by refusing to issue the permit, and in such cases its issue, not involving the exercise of a discretion, can be enforced by mandamus. But if a person or corporation has not

¹⁰ State ex rel. Waterbury v. New York, New Haven & Hfd. Rd. Co., 81 Conn. 645, 655, 71 Atl. 942, per Baldwin, J., citing Hartford v. Hartford Street Ry. Co., 73 Conn. 327, 47 Atl. 330; State ex rel. Howard v. Hartford Street Ry. Co., 76 Conn. 174, 56 Atl. 506.

¹¹ State ex rel. Dawson v. Parsons St. Ry. & Electrical Co. (Kan., 1909), 105 Pac. 704. The court, per Mason, J., said: "The final objection that is thought to require specific mention is that the writ ought not to issue because, granting that the street railway company must construct the kind of crossing prescribed by the board or none at all, it is under no public duty to construct any, and therefore is not subject to mandamus in that regard. The allegations of the alternative writ show that the company is now operating a continuous line from one side of the city to the other, save for the break caused by the railroad tracks. This arrangement may be regarded as in effect an operation of the street railway across the railroad by means of a transfer, and it is competent for the Railroad Commissioners to order this method to be changed. A peremptory writ will be awarded." *Id.*, 706.

¹² Kingston v. Kingston, P. & C. Elec. R. Co., 28 Ont. Rep. 399.

the right to do the thing which it is proposed to do under the permit applied for, the mayor would be under no obligation to issue it, not because he has a discretionary power to grant or withhold it, but because, either with or without the permit, the proposed act would be illegal. And where a railroad company fails to comply with the conditions of an ordinance, authorizing the construction of tracks, etc., upon certain streets but providing a time limit both as to commencing and completing the road, and said company by such noncompliance has forfeited its right under the ordinance it will not be entitled to a mandamus to compel the mayor and city commissioner to issue a permit to dig up the streets for the purpose of laying the tracks of the company.¹³ Mandamus will not issue in behalf of a street railway, where an appeal is pending and questions important to the public and the parties are presented thereby, and said railway is protected by a sufficient undertaking, given by the appellants, and the necessity for exercising the claimed right before determination of the appeal is not apparent. This was held in a case where a street passenger railway sought to condemn a way for a trolley line across a railroad's right of way, and to compel the joint construction of the crossing. It did not appear that there was a necessity for putting in said crossing before the litigation and the right to the crossing were finally determined.¹⁴

§ 371. When Mandamus Lies and Does Not Lie Against Telephone Companies.

Mandamus lies to compel a telephone company to place their telephones and furnish telephonic facilities without discrimination for those who will pay for the same and abide the reasonable regulations of the company.¹⁵ Mandamus also lies to compel the restoration of a telephone and the giving of service to a

¹³ State ex rel. Baltimore, Canton & P. B. Ry. Co. v. Latrobe, 81 Md. 222, 31 Atl. 788.

¹⁴ State ex rel. Oshkosh, A. & B. W. R. Co. v. Burnell, 104 Wis. 246, 80 N. W. 460.

¹⁵ Godwin v. Carolina Teleph. & Teleg. Co., 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, per Clark, J.

customer.¹⁶ And the writ may be issued to compel a telephone company to place a telephone in a telegraph company's office, within the territory of the former, notwithstanding a contract with, or license from, the parent company owning the patent, which forbids the licensee to furnish telephonic facilities to any telegraph company, except those designated by the licensor. This rule as to the last point is well settled.¹⁷ A telephone company will not, however, be compelled to install an instrument in a rival company's office, under a statute requiring such corporations to transmit the messages of other companies, since the remedy by way of penalty, provided by the statute, is adequate at law and is exclusive.¹⁸ Nor will the writ be issued to compel placing a telephone in a house which is used for an unlawful purpose, as in a case where the application was made to compel the defendant to put a telephone with necessary fixtures and appliances in the dwelling house of the plaintiff who was admitted to be a prostitute and keeper of that house as a bawdy-house. The objection was not to her character but to the character of her business at the house where it was sought to have the telephone placed since she would not be debarred from the right to have a telephone placed in another house owned by her but not kept as a bawdyhouse.¹⁹

¹⁶ *State ex rel. Payne v. Kimlock*, 93 Mo. App. 349, 67 S. W. 684.

¹⁷ *United States: State ex rel. Postal Tele. Cable Co. v. Delaware & Atl. Tele. & Teleph. Co.*, 47 Fed. 632, aff'd in 50 Fed. 677; *State ex rel. Baltimore & Ohio Tele. Co. v. Bell Teleph. Co.*, 23 Fed. 539 (court divided).

Indiana: Central Union Teleph. Co. v. State, 123 Ind. 113, 24 N. E. 215, s. c., 124 Ind. 600, 24 N. E. 1091; *Central Un. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604.

Maryland: Chesapeake & Pot. Teleph. Co. v. Baltimore & Ohio Tele. Co., 66 Md. 399, 7 Atl. 809.

New York: People ex rel. Postal Tele. Cable Co. v. Hudson River Teleph. Co., 10 N. Y. St. Rep. 282, 19 Abb. N. C. 466.

Vermont: Commercial Union Tele. Co. v. New England Teleph. & Tele. Co., 61 Vt. 241, 15 Am. St. Rep. 893.

¹⁸ *People ex rel. Oneida Teleph. Co. v. Central New York Teleph. & Tele. Co.*, 58 N. Y. Supp. 221, 41 App. Div. 17. Compare *Central Union Teleph. Co. v. State*, 118 Ind. 144, 194, 206, 19 N. E. 604. See § 380, herein.

¹⁹ *Godwin v. Carolina Teleph. & Tele. Co.*, 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251.

§ 372. When Mandamus Lies and Does Not Lie Against Telegraph Companies.

It is held that a stock telegraph company, one of whose corporate purposes is to furnish market quotations, may be compelled by mandamus to replace a ticker removed from a customer's office and furnish service therefor.²⁰ But such writ does not lie to compel a telegraph company to permit a telephone to be placed in its office for receiving and transmitting messages, as the former company cannot be compelled to receive oral messages, even though it has waived its rights in this respect, and has permitted another telephone company to place its instrument in said office.²¹

§ 373. When Mandamus Lies and Does Not Lie Against Water Companies.

Mandamus is an appropriate remedy to compel a public service water company to supply its customers with water upon compliance with its reasonable rules and regulations; and such a company has the undoubted right to adopt reasonable rules and regulations for the conduct of its business and it is a customer's duty to comply therewith; but in the absence of a statute making water rents a lien or incumbrance upon the premises, such a regulation is not reasonable if it can be construed as authorizing the cutting off of a water supply should a tenant refuse to pay delinquent water rents due by the landlord or former occupant, as this would coerce a person to pay the debt of another; otherwise as to cutting off a consumer's water supply until he has paid rents due by him.²²

²⁰ *Davis v. Electric Rep. Co.* (Pa.), 19 Wkly. N. C. 567, 2 Am. Elec. Cas. 375. Compare *Renville, In re*, 61 N. Y. Supp. 549, 46 App. Div. 37.

²¹ *People ex rel. Cairo Teleph. Co. v. Western Union Teleg. Co.*, 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637.

²² *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 62 S. E. 874. The court, per Jones, J., said: "The respondent cut off petitioner's water supply contrary to its rules, for nonpayment of a bill which appeared to be exorbitant, and which petitioner in good faith, and with show of reason, disputed, and thereafter respondent refused to enter into a contract to supply petitioner for the current year, except upon payment of the disputed bill. While a public service water company has the right to cut off a consumer's

Mandamus may also be employed to compel a water company to extend its mains in a city, where under the contract between the city and the company it is the duty of the company to make such extension.²³ But where there is no fraud or mistake set up, a contract voluntarily made with a water company and partly carried out for a long time cannot be ignored by a person so entering into said contract so as to enable him to maintain mandamus against such company to compel it to furnish water to him.²⁴

§ 374. Jurisdiction of Mandamus Proceedings.

The general power of the Federal Supreme Court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long line of decisions; but mandamus only lies in that court, as a general rule, where there is no other adequate remedy; nor can it be availed of as a writ of error.²⁵ A writ of mandamus issued under

water supply for nonpayment of recent and just bills for water rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill when it is unjust, or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term. *State ex rel. Gwynn v. Citizens' Tel. Co.*, 61 S. C. 98, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785; *Wood v. City of Auburn*, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376." The court also cited *upon the point of reasonable regulations and the right to cut off a water supply*, the following cases:

California: *Sherwood v. Citizens' Water Co.*, 90 Cal. 635, 27 Pac. 439.

Massachusetts: *Turner v. Revere Water Co.*, 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432.

Mississippi: *Burke v. City of Water Valley*, 87 Miss. 732, 40 So. 820, 112 Am. St. Rep. 468.

New York: *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136.

Washington: *Liune v. Bredes*, 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1070; *Tacoma Hotel Co. v. Tacoma Land Co.*, 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35.

²³ *Topeka, City of, v. Topeka Water Co.*, 58 Kan. 349, 49 Pac. 79.

²⁴ *State ex rel. Crawford v. Minnesota & M. Land & Inv. Co.*, 20 Mont. 198, 50 Pac. 420.

²⁵ *Atlantic City Railroad, In re*, 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct.

§ 688 of the United States Revised Statutes, is for the purpose of revising and correcting proceedings in a case already instituted in the courts and is part of the appellate jurisdiction of the Federal Supreme Court which is subject to such regulations as Congress shall make.²⁶ Circuit Courts of the United States, until Congress shall otherwise provide, have no power to issue a writ of mandamus in an original action for the purpose of securing relief by the writ, although the relief sought concerns an alleged right secured by the Constitution of the United States.²⁷ Nor has the Federal Circuit Court any original jurisdiction to issue a writ of mandamus at the instance of the Interstate Commerce Commission against a railroad company to compel it to make a report of the matters and things specified in § 20 of the act of Congress to regulate commerce where jurisdiction to issue mandamus is conferred under another section, in certain other cases, and it is clear that when Congress intended to give the power to issue such a writ it expressed that intention explicitly, and it also appears under other sections that special remedies are given.²⁸ And where an original action

208, citing *Pennsylvania Company, In re*, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. ed. 738; *Morrison, In re*, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. ed. 60; *Railway Co., Ex parte*, 103 U. S. 794, 26 L. ed. 461; *Baltimore & Ohio Rd. Co., Ex parte*, 108 U. S. 566, 27 L. ed. 812, 2 Sup. Ct. 876. A case of petition for writ of mandamus by a corporation directed to the judges of a Federal Circuit Court, commanding them to dismiss, "As against your petitioner," the bill of complaint in the suit, and to vacate against the petitioner, a certain order overruling the demurrer of the petitioner and to enter a decree to that effect. It was averred that the petitioner had a defense on the merits and that it had no adequate remedy by appeal, unless the Federal Supreme Court "will grant the mandamus as herein petitioned." The question of waiver of jurisdiction by appearance was also urged.

²⁶ *Winn, In re*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. 515.

²⁷ *Covington Bridge Co. v. Hager*, 203 U. S. 109, 51 L. ed. 111, 27 Sup. Ct. 24.

²⁸ *Knapp v. Lake Shore & Michigan Southern Ry. Co.*, 197 U. S. 536, 25 Sup. Ct. 538, 49 L. ed. 870. The court, per Mr. Justice McKenna, said: "Congress has undoubtedly power to authorize a Circuit Court to issue a mandamus in an original proceeding. *Kendall v. United States*, 12 Pet. (37 U. S.) 524, 9 L. ed. 1181; *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167. But has Congress done so, as contended, by §§ 12 and 20 of the Interstate Commerce Act as amended? Under § 12 the commission is given the authority to inquire into the management of the business of common

in mandamus was begun in a Federal Circuit Court by a bridge company to compel the auditor of public accounts for a State to issue his warrant on the State Treasury for the amount of a franchise tax collected under the authority of the State statute, and the return of the tax was asked upon the ground that it levied a burden on the interstate commerce business of the bridge company and was therefore repugnant to the Federal Constitution; it was held that Circuit Courts of the United States, until Congress shall otherwise provide, have no power to issue a writ of mandamus in an original action for the purpose

carriers subject to the act, and have the right to obtain from the carriers full and complete information to enable it to perform its duties. It is also authorized to enforce the provisions of the act. By § 20, the commission may require annual reports and fix the time and prescribe the manner in which such reports shall be made. And it is made the duty of any district attorney of the United States, to whom the commission may apply, to institute in the proper court and to prosecute under the direction of the attorney-general all necessary proceedings for the enforcement of the provisions of this act. It is hence contended that the power of the commission to require the report stated in the petition is undoubted, and having power to order the report to be made the commission has the power to enforce obedience to the order. But in what way? Manifestly only in such way as the courts have jurisdiction to give. All powers are given in view of that jurisdiction, and the amendments of the Interstate Commerce Act are so framed. Jurisdiction to issue mandamus is conferred by § 6 to enforce the filing or publishing by a common carrier of its schedules or tariffs of rates, fares and charges. And such jurisdiction is also given to the Circuit Courts and District Courts upon the relation of any person or persons, firm or corporation, alleging a violation of any of the provisions of the act which prevents the relator from having interstate traffic moved on terms as favorable as any other shipper. The remedy is expressly made cumulative of the other remedies provided by the act. It is clear, therefore, when Congress intended to give the power to issue mandamus it expressed that intention explicitly. Such power cannot be inferred from the grant of authority to one commission to enforce the act or from the direction to district attorneys or to the Attorney-General to institute 'all necessary proceedings for the enforcement of the provisions' of the act (§ 12). The proceedings meant are, as we have said, those within the jurisdiction of the court. And special remedies are given. For instance, by § 16, a summary proceeding in equity is authorized, and the form of the ultimate order of the court may be that of a 'writ of injunction or other proper process, mandatory or otherwise.' Without attempting now to define the extent of that section, we may say, it seems adequate to enable the commission to enforce any order it is authorized to make."

of securing relief by the writ, although the relief concerns an alleged right secured by the Constitution of the United States.²⁹

The Supreme Court of Wisconsin will take original jurisdiction of the writ of mandamus, upon the mere relation of a private person, in the name of the State, to compel the Secretary of State to revoke, as required by statutes, a State license to a foreign corporation to transact business forfeited by violation of its conditions. The jurisdiction being assumed because the subject-matter of the writ affects the prerogatives of the State, and not being founded upon the private right of the relator, a subsequent settlement between him and the corporation, leaving him without further interest in the application is immaterial.³⁰

Under a New York decision the court has no power in a proceeding by mandamus to compel a railroad company to restore a highway at the point of an overhead crossing to such conditions as will not impair its usefulness, to make permanent an encroachment of stone abutments upon a highway, provided the route of the highway is changed by acquiring additional land, so that the traveler may pass in safety over a straight course between the abutments, where their construction in that manner was without an order of the Supreme Court, as required by the railroad law, and was, therefore, illegal *ab initio*.³¹

Under a Nebraska decision where unjust discrimination was alleged against a railroad company, and such discrimination was found to exist, and it was ordered that the railroad company reduce its rates to conform to a schedule presented by a board of commissioners, and the railroad company neglected to comply with the order, it was held that mandamus was a proper

²⁹ Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109, 51 L. ed. 111, 27 Sup. Ct. 24.

³⁰ State ex rel. Drake v. Doyle, 40 Wis. 175, 22 Am. St. Rep. 692.

Where court without jurisdiction to compel insurance commissioner to grant license to society; mandamus denied Court of Honor of Ill., In re, 109 Wis. 625, 85 N. W. 497.

³¹ People ex rel. Bacon v. Northern Central Rd. Co., 164 N. Y. 289, 58 N. E. 138, modifying 54 N. Y. Supp. 1112; Railroad Law, § 11.

remedy to enforce said order, and that the mention of the District Court in the statute did not preclude bringing the action in the Supreme Court in any case where the latter court had original jurisdiction.³²

§ 375. Proper or Necessary Parties, Generally.

The officers of a building and loan association having the custody of its books and papers are proper parties in an action in mandamus to compel the association to permit the county assessor to examine its books for the purpose of determining whether any of the stock of such association has been omitted from taxation.³³ The owner and lessor of a railroad is not a necessary party to a proceeding by a mandamus to compel the restoration of a highway under the railroad law of 1890 of New York, and if it were, where the defect of parties appears upon the face of the proceedings and defendant fails to object thereto by demurrer under the Code of New York,³⁴ it is waived.³⁵

§ 376. Parties Plaintiff—Private Persons.

Private persons may, without the intervention of the government law officer, move for a mandamus to enforce a public duty not due to the government as such.³⁶ So a private person, who shows a direct and special interest in himself, may apply for a writ of mandamus to enforce a public duty, though the public may be affected, and it may be the duty of the commonwealth or the public, through its officers, to act in the matter. But

³² *State v. Fremont, Elkhorn & Missouri Valley R. R. Co.*, 22 Neb. 313, 23 Neb. 117, 68 N. W. 1022.

³³ *State ex rel. Morgan, Assessor, v. Real Estate Bldg. & Loan Assoc.*, 151 Ind. 502, 51 N. E. 1061.

³⁴ N. Y. Code Civ. Proc., § 2076.

³⁵ *People ex rel. Bacon v. Northern Central Rd. Co.*, 164 N. Y. 289, 58 N. E. 138, modifying 54 N. Y. Supp. 1112.

³⁶ *Union Pacific Rd. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428 (duty of railroad company to operate and run its whole road, including a bridge over the Missouri River, as one connected and continuous line); *Richmond Ry. & Electric Co. v. Brown*, 97 Va. 26, 32 S. E. 775, 1 Va. S. C. Rep. 213. See *First Nat. Bank v. Lancaster*, 54 Neb. 467, 74 N. W. 858.

the direct and special interest of a private individual which entitles him to apply for mandamus to enforce his private right in the performance of a public duty must be independent of and distinguishable from that which obtains to him in common with the general public, though it may be necessary that such particular interest should be different in kind from that of the general public or peculiar to the individual alone.³⁷

If an act of incorporation merely confers vitality and corporate existence on a corporation, and the terms and conditions on which it is to exercise its corporate powers are to be prescribed by some other designated authority, then such terms and conditions, when prescribed, become parts of the organic law of the corporation, and may be enforced by mandamus awarded on the application of a private person who is injured by their violation; and this applies where the defendant is entitled to a free transfer which he claims over the line of the street railway of the plaintiff.³⁸ A party must have a personal interest in the matter in order to enable him to maintain a mandamus proceeding to compel a corporation to comply with a statutory requirement that it post its by-laws in its principal place of business.³⁹ Again, mandamus will lie at the instance of a private citizen in the name of the people of the State to compel a lessee railroad company, which has reconstructed a crossing in such manner as to encroach upon a highway, to perform the public duty imposed upon it by the railroad law of New York,⁴⁰ of restoring the highway "to its former state or to such state as not to have its usefulness impaired," and the proceeding is entirely independent of the remedy given by the highway law of New York⁴¹ for the removal of encroachments upon a highway and the sections thereof⁴² relating to notice of, and direc-

³⁷ *Louisville Home Telephone Co. v. City of Louisville*, 130 Ky. 611, 113 S. W. 855.

³⁸ *Richmond Ry. & Electric Co. v. Brown*, 97 Va. 26, 1 Va. S. C. Rep. 213, 32 S. E. 775.

³⁹ *Boardman v. Marshalltown Grocery Co.*, 105 Iowa, 445, 75 N. W. 343.

⁴⁰ N. Y. Laws, 1890, chap. 565, § 11.

⁴¹ N. Y. Laws, 1890, chap. 568.

⁴² Sections 15 and 105.

tions for, their removal and providing, in connection with the town law of New York ⁴³ that the proceeding must be brought in the name of the town, have no application.⁴⁴

So a private party has such an interest as will enable him to be a relator in mandamus proceedings to compel the continued operation of a street railway line when the company attempts to discontinue the same, where he resides and owns property adjacent to such line and has incurred expense by improvements made in reliance upon its continuing its operation.⁴⁵ And mandamus to compel a city's executive board to advertise and sell a telephone franchise as directed by an ordinance providing therefor involves the enforcement of a public duty, and a private individual, who is a citizen and a resident, engaged in business in the city, and, as such, interested in the execution of the law, is a proper relator to institute such proceedings for the public, when the city attorney or other representative of the commonwealth fails to act in the matter.⁴⁶ But a private citizen, having no grievance of his own, but claiming to act in behalf of the public, is not entitled to a peremptory writ of mandamus requiring, under the provisions of the railroad law,⁴⁷ a street railroad corporation, operating two intersecting lines of railway in the city of New York, to carry for a single fare of five cents any passenger desiring to make a continuous trip from any point on one line to any other point on the other line, and to give to such passenger at the intersection of such lines, without extra charge, a transfer entitling him to make such continuous trip, since, even if it be true that the railroad company is violating the statute in question, the relator has shown no legal right in himself, and so far as the public is concerned, and so far as any individual may acquire such a right, the law

⁴³ N. Y. Laws, 1890, chap. 569, § 182.

⁴⁴ *People ex rel. Bacon v. Northern Central Rd. Co.*, 164 N. Y. 289, 58 N. E. 138, modifying 54 N. Y. Supp. 1112.

⁴⁵ *State ex rel. Grinsfelder v. Spokane Street R. Co.*, 19 Wash. 518, 41 L. R. A. 515, 53 Pac. 719.

⁴⁶ *Louisville Home Telephone Co. v. City of Louisville*, 130 Ky. 611, 113 S. W. 855.

⁴⁷ N. Y. Laws, 1892, chap. 676, § 104.

gives other and adequate legal remedies.⁴⁸ Again, where petitioner for a writ of mandate is a resident elector, property owner and taxpayer and he applies for such writ to compel the common council to put in action the election machinery of a city for the purpose of passing an ordinance by a direct vote, under its charter, confirming the granting of a franchise by the harbor commissioners to a railway corporation to erect and maintain a wharf and pier in tide lands and waters of a bay, and within the limits of the city, such writ will be denied as he is not "the party beneficially interested."⁴⁹ In such case the railway corporation itself is the only party to whom the law could imply a beneficial interest, and it did not appear that it had ever asked for a confirming ordinance and it had evidently abandoned the privileges granted by the harbor commissioners. Again, the petitioner was not only not beneficially interested in the franchise he was seeking to have confirmed by ordinance, but he did not even allege that he was one of the petitioners seeking to accomplish the passage of the ordinance by a direct vote.⁵⁰

§ 377. Parties—Attorney-General.

It is declared in a Michigan case that the attorney-general is not a "complainant." He does not petition. He "informs."

⁴⁸ *People ex rel. Lehmaier v. Interurban Ry. Co.*, 177 N. Y. 296, 69 N. E. 596, dismissing appeal, 83 N. Y. Supp. 622, 85 App. Div. 407.

⁴⁹ *Cal. Code Civ. Proc.*, § 1086.

⁵⁰ *Webster v. Common Council of City of San Diego*, 8 Cal. Civ. App. 480, 97 Pac. 92. The court, per Taggart, J., said: "If we were to assume that petitioner here, as a resident elector or taxpayer, is a competent person to ask the common council to put in action the election machinery of the city for the purpose of passing an ordinance by a direct vote, it would be idle for the court to grant his petition in the face of an abandonment of the franchise from the harbor commissioners by the grantee of the franchise. This, however, is not a case in which the taxpayer, resident or elector, as such, can be said to be a party beneficially interested. A taxpayer is said to be so interested in a matter which affects, or may affect directly, his assessment or taxes (*Hyatt v. Allen*, 54 Cal. 353). * * * Again, as a property owner he is beneficially interested in the disincorporation of a municipality in which he is a resident elector and taxpayer (*Frederick v. San Luis Obispo*, 118 Cal. 391 (50 Pac. 661)). The reason for his being considered a party beneficially interested in all these cases is clear, and it is equally clear that no such reason exists in the case at bar."

His intervention is purely official. He undertakes to put the court in possession of facts, which, when communicated in proper form, through the right official channel, impose upon the court determinate duties. He does not take the attitude or hold the language of an ordinary suitor. Formerly, if the suit immediately concerned the right of the State only, the information was commonly exhibited without a relator. But modern practice has made it usual, if not necessary, to name a relator upon the face of the information, in order, and only in order, to supply some one to be subject to costs. But the suit is still exclusively the suit of the official agent and must be prosecuted by his sanction, and be guided and controlled by his judgment.⁵¹ But there is no impropriety in naming the special counsel for the railroad commissioners, along with the attorney-general, as relators in a proceeding by mandamus instituted by the attorney-general and special counsel in compliance with the special directions of the commissioners, to compel the observance by a terminal company of a regulation made under the Constitution of Florida⁵² by the commissioners.⁵³

Under a Pennsylvania decision while a State statute provides that "two reputable citizens resident in the region traversed by the line" of a street railway company have a standing to petition the court for a mandamus to compel the attorney-general to institute proceedings against a street railway company to enforce the provisions of a statute prohibiting with the Constitution the issue of stock except for certain purposes, still, before that officer will be subject to a writ of mandamus to compel him to proceed under the enactment, he has a right to know the strength of the case he is asked to present in the name of the State; and the parties asking him to proceed must present for his consideration facts showing a *prima facie* case.⁵⁴

⁵¹ Attorney-General v. Moliter, 26 Mich. 444, 449, substantially the language of Graves, J., in a case holding that where the attorney-general has a right to intervene to restrain unauthorized corporate action, the regular course is for him to proceed by information rather than by a bill in equity.

⁵² Chapter 4700, Laws of 1899.

⁵³ State v. Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

⁵⁴ Cheetham v. McCormick, 178 Pa. St. 186, 35 Atl. 631.

In an original suit in a Texas court a mandamus was sought against the attorney-general of the State to compel him to pay over certain moneys alleged to be in the hands of the respondent and claimed to belong to the relator, a district attorney who claimed the exclusive right to institute, in behalf of the State, all suits in his district; it was alleged that certain suits had been brought in said district by the attorney-general, at the request of the railroad commission, to recover of a railroad corporation penalties incurred by it for refusal to permit a person to examine books and papers, and also against another railroad corporation to recover penalties for unlawful discrimination; the prayer was for the payment over to the relator of said moneys as commissions on the penalties recovered in such suits. It was held: (1) that the institution, prosecution, and management of all suits for penalties against railroads for the violation of provisions of the railroad commission law are committed exclusively to the commission and to the attorney-general; and a district or county attorney has no authority to institute a suit of this class, nor to appear in or prosecute it except by request of the railroad commission;⁵⁶ (2) that the Constitution of the State⁵⁶ did not confer on district or county attorneys the right to represent the State in all suits in the District Court; and the amendment to said Constitution,⁵⁷ empowered the legislature to confer upon the agencies created by it powers which were, before the adoption of the amendment, vested in other officers by the Constitution; (3) that the district attorney of a certain county was not entitled to commissions on penalties recovered in suits by the State, prosecuted by the attorney-general under direction of the railroad commission, for violation of its regulations by railroad companies.⁵⁸ An attorney-general cannot after the expiration of his term of office order the dismissal of a pending

⁵⁶ Section 2, Art. 10, Const., Amdt. of 1890; Rev. Stat., Arts. 4568, 4569, 4577.

⁵⁶ Section 21, Art. 5.

⁵⁷ Section 2, Art. 10.

⁵⁸ *Moore v. Bell, Attorney-General*, 95 Texas, 151, 66 S. W. 45. Compare *State ex rel. Missouri Pac. Ry. Co. v. Williams*, 221 Mo. 227 (point 10 of case).

action for the usurpation of a franchise by a street railway corporation, brought by him while in office upon relation of an individual, nor is such dismissal aided by the fact that before said expiration of his office said attorney-general had made a minute of his determination to dismiss such action.⁵⁰

§ 378. Parties—Defendants.

Officers of a corporation who have charge of its records and who must obey the writ, if issued, are proper parties defendant in mandamus to compel such corporation to permit an inspection of its books.⁶⁰ So where the railroad commissioners, under the power conferred on them by the Florida Constitution,⁶¹ have made a regulation requiring a terminal company corporation to admit a railroad company to the privileges and benefits of its common passenger station or terminal, and it appears that the commissioners had power to make the regulation,⁶² such regulation is to be deemed and held to be *prima facie* reasonable and just, and a writ of mandamus to compel observance of said regulation is properly addressed to the terminal company where the duty devolves upon it as a corporation, and not upon a particular officer of the company.⁶³ Again, where the incorporators of a mutual insurance company, pursuant to authority lodged in them, by the act under which the company is organized, to fix the number of directors and the manner of electing them, have vested the power to call the stockholders together for election purposes exclusively in the board of directors, the president and secretary of the company are not the proper respondents in mandamus proceedings to compel the reconvening of the stockholders for an election in compliance with the stockholders' minority law,

⁵⁰ *People v. Sutter Street Ry. Co.*, 117 Cal. 604, 49 Pac. 736. A case of an information by the attorney-general to obtain a judgment to have a franchise forfeited; *quo warranto* not an exclusive remedy.

⁶⁰ *State ex rel. Morgan v. Real Estate Bldg. & L. Fund Assoc.*, 151 Ind. 502, 51 N. E. 1061.

⁶¹ Section 6, chap. 4700, Laws, 1899.

⁶² Section 8, chap. 4700.

⁶³ *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 So. 225.

after an election in which the rights of the minority under such law have been disregarded.⁶⁴

§ 379. Necessity of Demand Upon or Notice to Party Before Bringing Mandamus.

An express demand is unnecessary as a condition precedent to bringing mandamus to compel the performance of a duty of a public nature where there is nothing which imposes upon anyone the duty of making such demand.⁶⁵

The Nebraska statute authorizing issuance of a peremptory mandamus without notice has reference to cases in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative, that notice must be dispensed with in order to prevent a failure of justice. But while it is competent for the legislature to authorize courts in a proper case to coerce official action without notice and an opportunity to the recalcitrant to be heard, no such power can be exerted against a private corporation or the officers by which its functions are performed.⁶⁶

§ 380. Defenses Available, Generally.

The remedy by mandamus to compel the furnishing of telephonic service is not taken away by the fact that a penalty is provided for noncompliance with a statute compelling service without discrimination.⁶⁷ And the fact that a railway company based its refusal of a shipper's request that it receive the cars of a connecting road for transportation over its line, as re-

⁶⁴ *Dusenbury v. Looker*, 110 Mich. 58, 3 Det. L. N. 289, 67 N. W. 986, 1 Am. & Eng. Corp. Cas. (N. S.) 602.

⁶⁵ *State ex rel. Burnham v. Cornwall*, 97 Wis. 565, 73 N. W. 93.

When demand sufficient as condition precedent to bringing mandamus, see Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 50 Pac. 1025.

What is a sufficient averment of a demand, see People ex rel. Attorney-General v. Reis, 76 Cal. 269, 18 Pac. 309.

⁶⁶ *Horton v. State*, 60 Neb. 701, 84 N. W. 87.

Alternative writ of mandamus may be granted either with or without previous notice of the application, as the court thinks proper, under N. Y. Code Civ. Proc., § 2607.

⁶⁷ *Central Union Teleph. Co. v. State*, 118 Ind. 144, 194, 206, 19 N. E. 604. But see § 371, herein.

quired by statute,⁶⁸ on the ground that it did not want to do business with such company, does not prevent it from relying upon any legal excuse it had for its refusal, in a proceeding by mandamus, to compel it to receive such cars.⁶⁹ So in mandamus proceedings by a contractor against a municipal corporation to compel the payment of a bond, respondent is not estopped to show that said bond was issued in reliance upon the promise of the contractor to thereafter complete the work in accordance with the contract, and that it had not done so.⁷⁰

§ 381. Pleadings—Sufficiency of Showing Demurrer—Judgment—Appeal.

In the absence of statutory provision to the contrary, the common-law rules of pleading govern in mandamus proceedings.⁷¹

An alternative writ of mandamus to compel the observance of a regulation made by the railroad commissioners under the powers conferred by the Florida Constitution ⁷² requiring a terminal company to admit a railroad company to the privileges and benefits of its common passenger station or terminal, and fixing rates for the uses and privileges of such terminal to be paid by such railroad company, need not allege any fact tending to show that the rates so fixed are reasonable and just, as such regulation is under the statute to be deemed and held to be *prima facie* reasonable and just.⁷³

Under a Kentucky decision an application by private individuals for mandamus to compel a city's executive board to advertise and sell a telephone franchise as directed by an

⁶⁸ McClain's Iowa Code, § 2039.

⁶⁹ Green Bay Lumber Co. v. The Chicago, Rock Island & Pacific Ry. Co., 102 Iowa, 292, 72 N. W. 406.

⁷⁰ Barber Asphalt Paving Co. v. Village of Highland Park, 156 Mich. 178, 16 Det. L. N. 76, 120 N. W. 621.

⁷¹ McCoy v. State, 2 Marv. (Del.) 543, 36 Atl. 81; Chicago G. W. Rd. Co. v. People, 179 Ill. 441, 53 N. E. 986, aff'g 79 Ill. App. 529.

See New York Code Civ. Proc., § 2076, as to contents of alternative writ of mandamus.

⁷² Chapter 4700, Laws, 1899.

⁷³ State v. Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

ordinance providing therefor, which avers that the applicants are taxpayers, and that one of them, who owns an existing franchise, expects to purchase the new franchise, without any showing as to how their property or other legal right, or the city's property or revenue, are injured by the refusal to sell the franchise, does not show that the applicants have such private right as entitled them to the writ.⁷⁴ If a relator includes greater relief than he is entitled to in the mandatory clause of a writ, it renders his petition and writ insufficient as against a demurrer for want of facts or a motion to quash.⁷⁵

In a Georgia case a petition for a mandamus to compel the ordinary of a county to issue a warrant to its treasurer in favor of a contractor, who had built and completed a courthouse for the county, in pursuance of a written contract between the ordinary and the contractor, and to deliver such warrant to the petitioner, a bank, who had furnished the money to the contractor for the erection of the building, under a contract between petitioner and the contractor that the latter would give orders on the ordinary for the delivery to the petitioner of warrants issued by the ordinary for amounts due the contractor, was held subject to the ground of a demurrer that set up that it did not appear from the petition that either the contract between the ordinary and the contractor, or the written order given by the latter to the petitioner on the ordinary for the warrants, and accepted in writing by the ordinary, was entered on the minutes of the ordinary, although it did appear that the contractor had fully performed his contract and that the building had been accepted by the ordinary and used ever since by the county, and that a fund for the payment of the cost of the erection of the courthouse had been levied and collected by taxation, and a sufficiency thereof to pay the warrant was in the county treasury.⁷⁶

The issue of the necessity of opening additional culverts on a

⁷⁴ Louisville Home Telephone Co. v. City of Louisville, 130 Ky. 611, 113 S. W. 855.

⁷⁵ State ex rel. v. Connersville Nat. Gas Co., 163 Ind. 563, 71 N. E. 483.

⁷⁶ Jones v. Bank of Cumming, 131 Ga. 191, 63 S. E. 36.

motion for a peremptory mandamus to compel a railroad company to restore certain culverts in its embankment, which the relator claims are indispensable to the usefulness of his land, is tendered by positive allegations in defendant's papers that no more than the existing culverts are necessary to the proper operation and management of the business for which the premises are used. Thus the perpetual maintenance by the Hudson River Railroad Company of the culverts deemed necessary when its embankment was constructed to give the owner of the land intersected by it the means of access to the Hudson River front is not required by the provision of the New York Code⁷⁷ that the company shall in such cases construct and sustain "convenient passes or roads across or under the railroad," for the purpose of giving the usual access to the river in farming or managing the land, but only such culverts need be maintained as will serve to meet the existing necessities and, therefore, the issuance of a peremptory mandamus commanding their restoration is reversible error.⁷⁸

The fact that a mandamus to compel a railroad company to extend its road to a terminus designated in its charter is refused because of the inability of the court to enforce its order, owing to the fact that the affairs of the company are in the hands of a receiver of the Federal Court, does not affect the question of the duty of the company to so extend its line. An order refusing a writ of mandamus is not such a judgment as concludes further inquiry as to the grounds upon which the writ is sought. A mandamus refused on one day may be granted on another if the ends of justice require it.⁷⁹

In New York there is no appeal from an order of the special term denying a peremptory writ of mandamus but granting the alternative writ.⁸⁰

⁷⁷ Section 16, chap. 216, *Laws*, 1846.

⁷⁸ *People ex rel. Frost v. New York Cent. & Hudson R. R. Co.*, 168 N. Y. 187, 61 N. E. 172, rev'g 70 N. Y. Supp. 684, 61 App. Div. 494.

⁷⁹ *Winchester & Strasburg Rd. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692.

⁸⁰ *People ex rel. Mt. Vernon Trust Co. v. Millard*, 127 App. Div. 77. The court, per Jenks, J., said: "We think that the appeal should be dismissed.

In *People ex rel. Ackerman v. Lumb*, 6 App. Div. 26, the relator moved for a peremptory writ, but the special term granted an alternative writ, and the respondents appealed. We held that the order was not appealable inasmuch as it was in the nature of an order to show cause, and did not affect a substantial right. See, too, *People ex rel. Levenson v. O'Donnel*, 99 App. Div. 253, 90 N. Y. Supp. 961, and cases cited; *Merrill on Mandamus*, § 306; *Baylies N. T. & App.* (2d ed.) 107. *Merrill on Mandamus* (supra) says: 'When the court upon the hearing of the application decides that, upon the allegations made, the relator is not entitled to a writ of mandamus, and refuses to grant either a motion to show cause or an alternative writ, the prevailing opinion in America is, that such action is a final judgment, from which an appeal or a writ of error may be taken to the appellate court.' "

CHAPTER XXII

ACTIONS AT LAW CONTINUED—QUO WARRANTO

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| § 382. Nature of <i>Quo Warranto</i> . | and Leave Corporation Intact. |
| 383. When <i>Quo Warranto</i> Not Exclusive Remedy — When Proper Remedy. | § 388. <i>Quo Warranto</i> to Control Rates and Charges. |
| 384. When Special or Statutory Actions or Proceedings Exclusive. | 389. Jurisdiction of <i>Quo Warranto</i> Proceedings. |
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§ 382. Nature of *Quo Warranto*.¹

The remedy by information in the nature of *quo warranto*, though criminal in form, is in effect a civil proceeding.² So, under the Illinois statute, it is a civil action.³ And a statute abolishing the common-law proceeding by information in the nature of *quo warranto*, and authorizing an action to be brought in cases in which that remedy was applicable,⁴ makes the proceeding a civil action for the enforcement of a civil right, subject to removal from State Courts to the Federal Courts when other circumstances permit. And proceedings by a State against a corporation created under its own laws, in the nature of *quo warranto* for the abandonment, relinquishment and surrender of

¹ See § 384, herein.

² *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. 437.

³ *People ex rel. Lord v. Bruennemer*, 168 Ill. 482, 48 N. E. 43.

⁴ See § 384, herein.

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its powers to another corporation with whom it has been consolidated under a law of the United States, and proceedings against the directors of said consolidated company for usurping the powers of such State corporation are, when in the form of a civil action, suits arising under the laws of the United States, within the meaning of the acts regulating the removal of causes.⁵

Under the Utah Constitution an information in the nature of *quo warranto* rather than the ancient writ is intended by the writ of *quo warranto* concerning which the Supreme Court is therein given jurisdiction.⁶

Under the Minnesota Constitution such proceedings are within what are therein denominated remedial cases and are not cases at law within that instrument.⁷ Under the common law an information in the nature of *quo warranto* will lie only for usurping a public office, and is never exercised in the case of a mere agency or employment determinable at the will of the employer. *Quo warranto* will not lie to determine conflicting claims of appointment to a position as superintendent of a mining company.⁸

Quo warranto is not a remedy to determine disputes between private persons and a corporation, or between corporations, but is to determine by what right a corporation exercises wrongfully or illegally a certain franchise, or to oust it from the right to be a corporation, for an abuse or nonuser of franchises granted, or for some violation of its charter.⁹

§ 383. When Quo Warranto Not Exclusive Remedy—When Proper Remedy.

A special grant to courts by the State Constitution of power to issue writs of *quo warranto* does not make such grant of jurisdiction exclusive of a proceeding by regular action to have a

⁵ *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. 437.

⁶ *State v. Elliott*, 13 Utah, 200, 44 Pac. 248.

⁷ *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020.

⁸ *State v. Cronan*, 23 Nev. 437, 49 Pac. 41.

⁹ *State ex inf. v. Atchison, Topeka & Santa Fe Ry. Co.*, 176 Mo. 687, 711, 75 S. W. 776, 63 L. R. A. 761.

franchise of a corporation forfeited for nonuser.¹⁰ So the legal organization of a corporation can be tested by such an information or by *scire facias*.¹¹ An information in the nature of *quo warranto*, and not a bill for injunction, is the appropriate remedy where the legal existence of a corporation is to be tested.¹² And although a bill in equity would lie to restrain a corporation organized for charitable purposes under a statute,¹³ from conducting a hospital and sanitarium for profit, the remedy by *quo warranto* is also appropriate, both remedies being provided by the statute.¹⁴ So an adjudication of ouster, involving a deprivation of all capacity to administer the trust reposed in defendant, is not the only relief grantable in these proceedings, but defendant may be prevented by a proper order from exercising any franchises or privileges not conferred upon it by law.¹⁵

Upon a bill between corporations to restrain the defendant from unwarrantably interfering with the rights, privileges and property of the complainant, upon charges preferred by each against the other, the successive steps in the organization of each will not be investigated for the purpose of determining whether the corporations legally exist. Such charges may be more properly investigated in a proceeding by *quo warranto*.¹⁶ If certain persons assume to act as lawfully elected directors the validity of their claimed election as such may be tested by a proceeding in the nature of *quo warranto* and not by injunction.¹⁷ On the other hand, directors have the same remedy when duly elected to compel their recognition.¹⁸

¹⁰ *People v. Sutter Street Ry. Co.*, 117 Cal. 604, 611, 49 Pac. 736.

¹¹ *Lincoln Park Chapter No. 177, R. A. M. v. Swatek*, 105 Ill. App. 604, aff'd in 68 N. E. 429.

¹² *Osborn v. Oakland*, 49 Neb. 340, 68 N. W. 506.

¹³ Act No. 242, Laws of Mich., 1863.

¹⁴ 3 Comp. Laws of Mich., §§ 9755, 9950.

¹⁵ *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 15 Det. L. N. 24, 115 N. W. 423.

¹⁶ *Denver & S. Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673.

¹⁷ *Carmel Natural Gas & I. Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476.

¹⁸ *Attorney-General v. Looker*, 111 Mich. 498, 4 Det. L. N. 745, 69 N. W. 929.

§ 384. When Special or Statutory Actions or Proceedings Exclusive.

Neither the ancient writ of *quo warranto* nor the information in the nature thereof was ever in force in the State of Tennessee.¹⁹ In that State the Code²⁰ relating to "special actions and proceedings" provides for "proceedings in the name of the State against corporations, and to prevent usurpation of office," and a bill to oust a foreign corporation from the State and to obtain a perpetual injunction against its doing business in the State is the same that applies to all domestic corporations and to all foreign corporations, within the borders of that State, and there is no other process of law known to the practice of said State by which such a litigation can be inaugurated or conducted. It is a purely civil proceeding, and judgments eventuating thereunder, to the effect that corporation or corporations dependent thereto shall forfeit their charters or be ousted from the State, as the case may be, are civil judgments and not criminal sentences.²¹

Again, in New York the writ of *quo warranto* and proceedings in the nature of *quo warranto* were abolished by the Code in that State, and the relief formerly obtained by means of such writ or proceeding is obtained by appropriate action therefor by and in the name of the people.²²

§ 385. Quo Warranto Lies in Case of Unlawful Exercise of Corporate Power or Franchises.²³

Quo warranto is the proper remedy in case of an unlawful

¹⁹ State v. Standard Oil Co. of Ky., 120 Tenn. 86, 134, 110 S. W. 565.

²⁰ Shannon's Code, §§ 5165-5187; Code of 1858, §§ 3409-3431.

²¹ State v. Standard Oil Co. of Ky., 120 Tenn. 86, 134, 110 S. W. 565.

²² N. Y. Code Civ. Proc., §§ 1983 *et seq.* See Herring v. New York, Lake Erie & W. Rd. Co., 105 N. Y. 340; People v. Hall, 80 N. Y. 117.

As to like statutory provisions as New York, see Wishek v. Becker, 10 N. Dak. 63, 84 N. W. 590; State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

When statutory remedy exclusive, see State ex inf. Crow v. Atchison, Topeka & Santa Fe Ry. Co., 176 Mo. 687, 73 S. W. 776; Rev. Stat., 1899, chap. 12, Arts. 2, 4.

²³ See § 383, herein.

assumption of the power to exercise a franchise.²⁴ So an information in the nature of *quo warranto* lies against a corporation for the unlawful exercise or usurpation of privileges whereby the rights of others are injured, encroached upon, or put to hazard.²⁵ An information in the nature of *quo warranto* also lies against an incorporated company for carrying on banking operations without authority from the legislature.²⁶ And where a railroad corporation claims certain rights or privileges in lands of the State such right may be contested by *quo warranto*.²⁷ If a corporation exercises a right to use the streets of a municipality for gas pipes for lighting it is a person and is exercising a public franchise within the meaning of a statute prohibiting the unlawful exercise by any person of any public franchise and authorizing the bringing of *quo warranto* in such case.²⁸

§ 386. Quo Warranto to Forfeit or Annul or Test Franchises of Corporation—Ouster.

Quo warranto is the proper remedy to obtain the forfeiture of a corporation's franchise.²⁹ And that writ or an action in the nature of *quo warranto* is the proper remedy at the suit of the State to test the right of a corporation to exercise its franchises or to declare them forfeited.³⁰ So *quo warranto* lies to forfeit

²⁴ *State v. City of Topeka*, 30 Kan. 653, 2 Pac. 587.

²⁵ *Hartnett v. Plumbers' Supply Assoc.*, 160 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194.

²⁶ *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 357, 8 Am. Dec. 243.

²⁷ *State ex rel. Richards v. Pittsburg, Chicago, Cincinnati & St. Louis Rd. Co.*, 52 Ohio St. 1, 34 Ohio L. J. 15, 41 N. E. 205.

²⁸ *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114; *Ballinger's Annot. Codes & Stat.*, § 5780, subd. 1.

²⁹ *People v. Chicago Telephone Co.*, 220 Ill. 238, 77 N. E. 245.

The ancient writ of *quo warranto* is the proper remedy to seize into the hands of the State the franchises of a corporation which has forfeited them by misusers or nonuser. *State v. Real Estate Bank*, 5 Ark. (5 Pike) 595, 41 Am. Dec. 509.

That State has power to forfeit charter for abuse of corporate privileges, see *New Orleans Water Works Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. 691.

³⁰ *Ripstein v. Haynes Medina Valley Ry. Co.* (Tex. Civ. App.), 85 S. W. 314; *Sayles*, Ann. Civ. Stat., 1897, Art. 5243i.

a corporate franchise, or the right to exercise the same by occupation of a city's streets under an ordinance.³¹

Under a Wisconsin decision, the only remedy whereby the validity of a grant to a water company of the right to furnish the granting city with water can be tested is *quo warranto* for usurpation of such franchise.³² And a right granted by ordinance to a corporation to operate an interurban railway upon the streets of a city is a "franchise" within the meaning of the word as used in the statute relating to *quo warranto*, and for proper cause may be annulled in an action of that character.³³ Again, that writ lies to oust a foreign corporation from unlawfully exercising rights, privileges and franchises.³⁴

Quo warranto may also be maintained and a judgment of ouster properly rendered against a water company which renders its water impure by pumping water into its mains from a mill pond which received the seepage of a town and with which it had a pipe connection.³⁵

But *quo warranto* will not lie against a railroad corporation to oust it from the exercise of certain rights, privileges and franchises alleged to be illegally exercised by it; as in the case of a violation of an alleged custom of gratuitously performing certain services affecting grain dealers for which a right to make a particular charge on grain, called a reconsignment charge, made for such services, after the grain has been delivered on certain of its tracks, in transferring the grain to other railroads. No legal right can be predicated on an alleged custom for

³¹ *People v. Chicago Telephone Co.*, 220 Ill. 238, 77 N. E. 245.

³² *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818.

When suit in nature of quo warranto does not lie for usurpation of franchises, see *Haupt v. Rogers*, 170 Mass. 71, 48 N. E. 1080.

³³ *Olathe, City of, v. Missouri & Kansas Interurban Ry. Co.*, 78 Kans. 193, 96 Pac. 42.

³⁴ *State ex rel. Atty. Gen'l v. Fidelity & C. Ins. Co.*, 49 Ohio St. 440, 31 N. E. 655, 16 L. R. A. 611, 28 Ohio L. J. 26, 20 Wash. L. Rep. 485, 21 Ins. L. J. 678. See *State ex rel. Phillips v. Fidelity & C. Co.*, 77 Iowa, 643; *State v. Boston, C. & M. Rd. Co.*, 25 Vt. 433.

³⁵ *Commonwealth v. Potter County Water Co.*, 212 Pa. 463, 61 Atl. 1099.

gratuitous service.³⁶ Whether a corporation has forfeited its charter by nonuser and misuser under the law of a State does not involve a Federal question, and a proceeding regularly brought by the attorney-general in the nature of *quo warranto* constitutes due process of law.³⁷

§ 387. Quo Warranto to Forfeit Only Misused Franchise and Leave Corporation Intact.

According to the common law of most of the States, if the franchises of a corporation are not dependent upon each other, it is competent for the court in the exercise of its discretion upon *quo warranto* proceedings to decree a forfeiture of the misused franchise and leave the corporation intact.³⁸

§ 388. Quo Warranto to Control Rates and Charges.

A corporation may be proceeded against, for taking illegal rates, by *quo warranto*.³⁹ That writ is also the proper remedy against a railroad corporation where it charges excessive fares in comparison with those charged by other companies originally

³⁶ *State ex inf. v. Atchison, Topeka & Santa Fe Ry. Co.*, 176 Mo. 687, 712, 75 S. W. 776, 63 L. R. A. 761.

³⁷ *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 52 L. ed. 1080, 28 Sup. Ct. 732.

³⁸ *State v. Boston & Maine Rd. Co.* (N. H., 1909), 74 Atl. 542, 549, per Bingham, J. (in a case of an information in equity by the Attorney-General to restrain defendants from demanding excessive rates), citing *State v. Barron*, 57 N. H. 498; *Id.*, 58 N. H. 370; *State v. Bridge Co.*, 85 Me. 17, 33, 26 Atl. 947; *State v. Canal Co.*, 23 Ohio St. 121; *State v. Association*, 35 Ohio St. 258, 264; *State v. Association*, 42 Ohio St. 579, 584; *State v. Gas Co.*, 153 Ind. 483, 491, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314; *Marion Bond Co. v. Rubber Co.*, 160 Ind. 558, 561, 65 N. E. 748; *State v. Railway*, 36 Minn. 246, 30 N. W. 816.

³⁹ *New Orleans Water Works Co. v. Louisiana*, 185 U. S. 336, 349, 46 L. ed. 936, 22 Sup. Ct. 691. The court, per Mr. Justice Peckham, said: "That the State has power to forfeit the charter of a corporation for an abuse of its privileges is recognized as the law of Louisiana. The Civil Code of that State, Article 447, has for many years authorized a proceeding in the nature of a *quo warranto* to forfeit the charter for misuse, and it has been held that such article applies to every charter granted since its adoption. *Atchafalaya Bank v. Dawson*, 13 La. R. 497; *State of Louisiana v. New Orleans Gas Light & Banking Company*, 2 Rob. (La.) 529, 532."

in possession of roads which it has acquired under the statute by lease or purchase.⁴⁰

§ 389. Jurisdiction of Quo Warranto Proceedings.

In Utah the proceeding in the nature of *quo warranto* rather than the ancient writ of *quo warranto* is intended by that provision of its Constitution under which the jurisdiction of the Supreme Court is derived.⁴¹

In Missouri the writ lies from the Supreme Court to an inferior court when the latter refuses to perform some act over which under the law it has jurisdiction and which it is required to perform, and the relator has a clear legal right to have such inferior court exercise its jurisdiction, and has no other adequate remedy therefor.⁴² The Constitution of that State in giving the Supreme Court power to issue, hear and determine "writs of *quo warranto*," included proceedings on information in the nature of a *quo warranto*, and thereby gave the said court jurisdiction to hear and determine such civil proceedings.⁴³

Again, the laws of the State of Missouri authorize and direct the attorney-general to institute civil proceedings in the Supreme Court by information in the nature of *quo warranto* against any corporation to annul its charter and forfeit its franchises whenever it has by misuser, nonuser or usurpation of powers, so conducted itself as to violate the laws of its being, the antitrust statutes or the criminal laws of the State; and the Supreme Court has jurisdiction to hear and determine such civil proceedings, nor can the Supreme Court be ousted of its jurisdiction by the fact that the corporation's conduct is violative of the criminal laws of the State, nor can the corporation justify or defend upon any such plea. The court has no original jurisdiction over a proceeding that is essentially a criminal prosecution, but the proceeding upon information in

⁴⁰ State v. Toledo Railway & Light Co., 23 Ohio Cir. Ct. Rep. 603.

⁴¹ State v. Elliott, 13 Utah, 200, 44 Pac. 248.

⁴² State ex rel. Union Electric Light & Power Co. v. Grimm, 220 Mo. 483, 489.

⁴³ Syllabus in State v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902. See Walker v. Equitable Loan & Inv. Assoc., 142 Mo. 325, 41 S. W. 916.

the nature of a *quo warranto* to oust the company of its franchises for a violation of the antitrust statutes, and to impose penalties on it if it is found guilty, is a civil one, and of that the Supreme Court has jurisdiction, and in determining it it is immaterial whether the corporation has also been guilty of a crime which would subject it to prosecution upon indictment before a court and jury.⁴⁴ When *quo warranto* to forfeit their charters was brought against several corporations having their domicile in different counties, the Circuit Court of one of the counties was held to be without jurisdiction even though some of the corporation defendants were therein domiciled.⁴⁵

§ 390. Parties—State—Attorney-General.

The State may bring an action of *quo warranto* to test the validity of a corporate organization either against the persons who officially undertake to exercise its powers and franchises or against the organization itself by the name it assumes; and in either case a valid and binding judgment of nullity may be rendered.⁴⁶ The attorney-general is a proper party in *quo warranto* to oust a corporation from usurpation of franchises.⁴⁷ So an attorney-general has, without leave of court, the right at any time to file in the proper court an information in *quo warranto* wherein matters of public interest are involved, but he cannot maintain such a proceeding solely for the vindication of private rights or the redress of private grievances in which the public has no interest, and if these facts appear from the information, they may be taken advantage of by return or special plea to the order to show cause.⁴⁸ An authority conferred by a State Constitution upon the attorney-general to prosecute all proper actions in the courts to prevent the un-

⁴⁴ Syllabus in *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

⁴⁵ *State v. Mississippi Cotton Oil Co.*, 79 Miss. 203, 30 So. 609.

⁴⁶ *Gardner v. The State*, 77 Kan. 742, 95 Pac. 588.

⁴⁷ *State ex rel. Crow v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 598.

⁴⁸ *State ex inf. v. Atchison, Topeka & Santa Fe Ry. Co.*, 176 Mo. 687, 707, 75 S. W. 776, 63 L. R. A. 761 (considering and citing numerous authorities); *State ex inf. v. Missouri Pacific Ry. Co.*, 176 Mo. 718, 75 S. W. 888; *State ex inf. v. Chicago, Rock Island & Pacific Ry. Co.*, 176 Mo. 721, 75 S. W. 888.

lawful exercise of power by corporations is exclusive and renders invalid any statutory attempt to confer upon district or county attorneys a power to bring *quo warranto* in like cases, even though another provision of the Constitution empowers the latter attorneys to represent the State in all cases in the district and inferior courts.⁴⁹ The attorney-general in behalf of the State and at its expense, and not an attorney acting for a town and at its expense, should prosecute an information in the nature of *quo warranto* brought to obtain the forfeiture of a corporation's franchise because of misuser or nonuser thereof.⁵⁰

§ 391. Parties—Plaintiffs—Defendants—Joinder.

A private person cannot, in Massachusetts, maintain *quo warranto* in his own name in cases not provided for under the statute.⁵¹

A city which grants by ordinance a right to operate an inter-urban railway upon its streets, is a proper plaintiff in an action of the character of *quo warranto* to forfeit the rights so granted and for the annulment of the franchise where the statute authorizes it to be brought by the person claiming an interest adverse to the franchise which is its subject.⁵²

Information in nature of a *quo warranto*, lies against persons acting as trustees of an incorporated church, but the court will grant or refuse it, according to circumstances.⁵³

Quo warranto proceeding cannot be maintained against a superintendent of a mining corporation where his employment depends upon the will of the directors, as he is not a person unlawfully exercising an office in a corporation created by the laws of the State within the intent of a statute providing for

⁴⁹ *State v. International & G. N. R. Co.*, 89 Tex. 562, 35 S. W. 1067.

⁵⁰ *Attorney-General v. Adonai Shomo Corp.*, 167 Mass. 424, 45 N. E. 762.

When attorney-general cannot bring quo warranto but county attorney must institute proceedings to determine usurpation of corporate franchises, see State v. Seattle Gas & Electric Co., 28 Wash. 488, 70 Pac. 114; *Ballinger's Ann. Codes & Stat.*, § 5781.

⁵¹ *Haupt v. Rogers*, 170 Mass. 71, 48 N. E. 1080.

⁵² *Olathe, City of, v. Missouri & Kansas Interurban Ry. Co.*, 78 Kan. 193, 96 Pac. 42.

⁵³ *Commonwealth v. Arrison*, 15 Serg. & R. (Pa.) 127.

such a proceeding in such cases.⁵⁴ One corporation may be joined with another as defendants in a suit in the name of the State on information in the nature of a *quo warranto* to oust them of their franchises upon a charge of abuse or usurpation of corporate powers.⁵⁵

§ 392. Seeking Other Relief as Condition Precedent to Granting Quo Warranto.

In an original proceeding in *quo warranto* to forfeit the right to operate a railway on the streets of a city the case will be dismissed where it does not appear that there has been a sufficient effort to obtain relief by other means, as the courts are reluctant to adjudge forfeitures of corporate privileges and franchises.⁵⁶

§ 393. Pleadings—Sufficiency of Showing.

An information in the nature of *quo warranto* for usurping a franchise need show no title in the people to the franchise, but it lies with the defendant to show his warrant for exercising it.⁵⁷ It need not be alleged that the misuser relied on in *quo warranto* as a ground for forfeiture of a franchise is willful.⁵⁸

In Illinois the allegations in any information in *quo warranto* may be of a general character, while defendant is required to set forth particularly the grounds of his claim and the continued existence of his right. The course of pleading is the same as in other forms of action, the action of *quo warranto* being purely a civil one, and common-law pleadings govern in

⁵⁴ State ex rel. Ryan v. Cronan, 23 Nev. 437, 40 Pac. 41.

Parties defendant in quo warranto, see Saunders v. Kohnke, 109 La. 838, 33 So. 793.

⁵⁵ Syllabus in State v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

Joinder of parties defendant in quo warranto, see State v. Leischer, 117 Wis. 475, 94 N. W. 290.

⁵⁶ Olathe, City of, v. Missouri & Kansas Interurban Ry. Co., 78 Kan. 193, 96 Pac. 42.

⁵⁷ People v. Utica Ins. Co., 15 Johns. (N. Y.) 357, 8 Am. Dec. 243. See § 384, herein.

⁵⁸ State ex rel. Walker v. Equitable Loan & Inv. Assoc., 142 Mo. 325, 41 S. W. 916.

that State in matters of *quo warranto*; but while a defendant in pleading to an information of that character must either disclaim or justify, and if he pleads justification he must necessarily state specifically the grounds of his defense, still it is not necessary or proper for a plea to anticipate a matter which should come from the other side.⁶⁰

In Michigan an information in the nature of *quo warranto* against a corporation organized as a charitable hospital under a statute,⁶⁰ which alleges that defendant's business is not being conducted as a charity but for the profit of its officers, and that it has accumulated a large amount of property which it claims is exempt from taxation, and that defendant was organized under said law for the purpose of claiming the exemption for its property and not as a legitimate charity, states a case under the statute.⁶¹

In Missouri the pleadings in an information in the nature of *quo warranto* are governed by the rules in civil cases rather than those which apply to criminal proceedings, in matters of form, as well as in matters of substance. It devolves upon the State to charge or aver that the respondent has a corporate existence, and if the evident purpose is to have the charter forfeited for nonuser, misuser or usurpation of powers, then the pleader must plead specifically the acts of nonuser, the acts of misuser, or of usurpation relied upon for grounds of forfeiture, so that the corporation may know what it is called upon to meet and defend, and when the information attempts to set out the details of the usurpation of the franchises and all the facts are pleaded, an issue of law may be tendered by demurrer, as not only the statute of that State, but the decisions thereof, have recognized the right to demur to the information in the nature of *quo warranto*.⁶² And in that State an information in *quo warranto* to oust a corporation which contains general allega-

⁶⁰ *People v. Heidelberg Garden Co.*, 233 Ill. 290, 84 N. E. 230, aff'g 124 Ill. App. 331.

⁶¹ Act No. 242, Laws, Mich., 1863.

⁶² *People v. Michigan Sanitarium & Benevolent Assn.*, 151 Mich. 452, 15 Det. L. N. 24, 115 N. W. 423, 3 Comp. Laws of Mich., § 9950.

⁶³ *State ex rel. Union Electric Light & Power Co. v. Grimm*, 220 Mo. 483.

tions of the facts constituting the misuser, nonuser or usurpation, is sufficient. The State is not required, as in an indictment in a criminal prosecution, to allege and prove in detail the facts constituting the mode and manner in which defendants have violated the law against combinations in restraint of trade or the usurpation of powers not granted by their charters. And an information which does not charge defendants with forming a combination to maintain prices, but only with combining to regulate, control and fix prices, is sufficient. While certain sections of the statutes of a State⁶³ prohibit a combination to maintain prices, and do not prohibit combinations to fix, regulate and control prices, but another section⁶⁴ does in express terms prohibit such combinations, all should be construed together as one act, and where that is done there is no room for niceties of meaning between "to maintain prices" and "to fix, regulate and control prices."⁶⁵ A showing that a corporation claims rights and privileges not within its grant of power or that it intends or threatens to exercise the same is not sufficient to justify a court in entertaining proceedings in *quo warranto* for the forfeiture of its charter.⁶⁶ If it is not averred in the information that the corporation, whose charter it is sought to forfeit, is organized under the laws of the State, the information is demurrable.⁶⁷

§ 394. Defenses Available, Generally.

The existence of an agreement with a borough whereby a water company is able to maintain a connection with a mill pond will not prevent a judgment of ouster, under a writ of *quo warranto* against a water company, for rendering its water unfit for use by pumping water from such pond, which received the seepage of a town, into the water mains.⁶⁸

⁶³ Mo. Rev. Stat., 1899, §§ 8965, 8966.

⁶⁴ Section 8978.

⁶⁵ Syllabus in *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

⁶⁶ *Attorney-General v. Superior & St. C. Rd. Co.*, 93 Wis. 604, 67 N. W. 1138.

⁶⁷ *Snyder v. Citizens' Gas & O. Min. Co.*, 151 Ind. 505, 51 N. E. 1067.

⁶⁸ *Commonwealth v. Potter County Water Co.*, 212 Pa. St. 463, 61 Atl. 1099.

§ 394 ACTIONS AT LAW CONTINUED—QUO WARRANTO

It is held that the constitutionality of a statute, because of the failure to provide for compensation to abutting owners for the use of streets by a telephone company, will not be considered in *quo warranto* proceedings by the State, brought only to oust a telephone company from the city's streets; nor in such proceedings will an ordinance granting a franchise, within the power of the city, be declared void because of an irregularity in the passage of the enactment.⁶⁹ Where *quo warranto* is brought against a foreign corporation on the ground that it is unlawfully exercising certain franchises the fact that it has a license from the state superintendent of insurance constitutes no bar.⁷⁰

⁶⁹ State v. Nebraska Teleph. Co., 127 Iowa, 194, 103 N. W. 120.

⁷⁰ State ex rel. Attorney-General v. Fidelity & C. Ins. Co., 49 Ohio St. 440, 28 Ohio L. J. 26, 20 Wash. L. Rep. 485, 31 N. E. 655, 16 L. R. A. 611, 21 Ins. L. J. 678.

CHAPTER XXIII

ACTIONS AT LAW CONTINUED—PROHIBITION

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| <p>§ 395. Nature of Prohibition, Generally.</p> <p>396. Nature of Prohibition Continued—Is a Discretionary Writ—Effect of Judgment or Sentence.</p> <p>397. Prohibition Does Not Lie Where There Is a Plain and Adequate Remedy—Exhausting Remedies.</p> | <p>§ 398. Where Act Sought to Be Prohibited Has Been Done.</p> <p>399. Prohibition to Court Without Jurisdiction or Where It Exceeds Jurisdiction.</p> <p>400. Prohibition to Admiralty Court.</p> <p>401. Prohibition — Parties, Generally.</p> |
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§ 395. Nature of Prohibition, Generally.

The writ of prohibition issues by way of preventive relief not to supply other remedies or to serve in their place as in case of an appeal.¹ It is also held not to be a writ of right.² A writ of prohibition should issue from the law side of the court.³

Under a Missouri decision, however, the intent of the statute is that a simple form of action should be had between the parties in conformity with the Code as far as applicable.⁴

§ 396. Nature of Prohibition Continued—Is a Discretionary Writ—Effect of Judgment or Sentence.

A party is entitled to a writ of prohibition as a matter of right where it appears that the court whose action is sought to be prohibited had clearly no jurisdiction of the cause originally,

¹ *Valentine v. Police Court of San Francisco*, 141 Cal. 615, 75 Pac. 336.

² *Holly Shelter Rd. Co. v. Newton*, 133 N. C. 132, 136, 45 S. E. 549.

³ *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601.

A writ of prohibition is either alternative or absolute. N. Y. Code Civ. Proc., § 2091.

⁴ *State ex rel. St. Louis & K. R. Co. v. Hirszel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.

or of some collateral matter arising therein, and that he objected to the jurisdiction at the outset, and has no other remedy; where there is another remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary; and it is not obligatory where the case has gone to sentence, and the want of jurisdiction does not appear on the face of the proceedings.⁵

Where there is another remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends on facts which are not made matter of record, or where the application for a writ of prohibition is made by a stranger, the granting or refusal of the writ is discretionary; and it is not obligatory where the case has gone to sentence, and the want of jurisdiction does not appear on the face of the proceedings.⁶ Again, it is held that the writ is so far a discretionary one that it must appear that irreparable damage would result if it should not be granted.⁷

Prohibition will not, however, go after judgment and sentence, unless want of jurisdiction appears on the face of the proceedings; but, before judgment, the Superior Court can examine not simply the process and pleadings technically of record, but also the facts and evidence upon which action was taken.⁸

§ 397. Prohibition Does Not Lie Where There Is a Plain and Adequate Remedy—Exhausting Remedies.

The writ of prohibition will not be granted if the petitioner has a plain, complete, adequate and speedy remedy by some

⁵ *New York & Porto Rico Steamship Co., In re*, 155 U. S. 523, 39 L. ed. 246, 15 Sup. Ct. 183.

⁶ *New York & Porto Rico Steamship Co., In re*, 155 U. S. 153, 15 Sup. Ct. 183, 39 L. ed. 246; *Rice, In re*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. 194; *Alix, In re*, 166 U. S. 136, 17 Sup. Ct. 948, 41 L. ed. —. See *Kilty v. Jackson*, 184 Mass. 310, 68 N. E. 236.

⁷ *Holly Shelter Rd. Co. v. Newton*, 133 N. C. 132, 136, 45 S. E. 549. See *State ex rel. Mayer v. Rightor*, 40 La. Ann. 837, 6 So. 102; *Ensign Co. v. Carroll*, 30 W. Va. 532, 4 S. E. 782.

⁸ *Cooper, In re*, 143 U. S. 472, 36 L. ed. 432, 12 Sup. Ct. 453.

other proceeding or action; ⁹ the writ is not to supply the place of other remedies; ¹⁰ nor is it necessary to wait until all remedies are exhausted in the inferior court. ¹¹ It is held, however, that an application for a writ of prohibition will not be considered unless it is shown that relief was unsuccessfully sought in the lower court. ¹² Nor will such a writ be granted in favor of a corporation where the law affords an adequate remedy to correct the errors on which the relief sought for in the petition is based. ¹³

Under the provisions of the Idaho statute ¹⁴ a writ of prohibition will be issued upon proper complaint or petition to arrest proceedings which are without or in excess of the jurisdiction of such tribunal, corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It was held, therefore, that if an appeal is authorized under the facts of the case it would not be a plain, speedy and adequate remedy in the ordinary course of law. ¹⁵

⁹ *Alabama*: Smith, Ex parte, 23 Ala. 94.

California: McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020 (under Code Civ. Proc., § 1102); Western Meat Co. v. Superior Court, 9 Cal. App. 538, 99 Pac. 976; Keith v. Recorder's Court, 9 Cal. App. 380, 99 Pac. 416; Hubbard v. Justices' Court, 5 Cal. App. 90, 89 Pac. 865.

Colorado: McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

District of Columbia: Dahlgreen, In re, 30 App. D. C. 588.

Idaho: Bellevue Water Co. v. Stockshager (Idaho, 1895), 43 Pac. 568.

Michigan: Port Huron Savings Bank v. St. Clair Circuit Judge, 147 Mich. 551, 14 Det. L. N. 2, 111 N. W. 202.

Minnesota: State ex rel. Townsend v. Ward, 70 Minn. 58, 72 N. W. 825.

Missouri: State ex rel. Missouri Pac. R. Co. v. Seay, 23 Mo. App. 623.

Nevada: Low v. Crown Point Min. Co., 2 Nev. 75.

New York: People v. Westbrook, 89 N. Y. 252; People v. Nichols, 79 N. Y. 582, rev'g 18 Hun, 530.

Utah: Board of Home Missions of Presby. Church of U. S. v. Maughan (Utah, 1909), 101 Pac. 581.

Washington: State v. Superior Court, 51 Wash. 572, 99 Pac. 760; State v. Superior Court, 50 Wash. 650, 97 Pac. 778; State v. Moore, 23 Wash. 115, 62 Pac. 441.

¹⁰ State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191.

¹¹ N. N. & M. V. Co. v. McBrayer, 15 Ky. L. Rep. 399.

¹² Quaker Realty Co., In re, 122 La. 43, 47 So. 360.

¹³ Western Meat Co. v. Superior Court, 9 Cal. App. 538, 99 Pac. 976.

¹⁴ Section 4995, Rev. Stat. Idaho.

¹⁵ Cronan v. Dist. Court, 15 Idaho, 184, 96 Pac. 768.

Again, the court will deny an application for a writ of prohibition sought for the purpose of restraining respondents from trying a corporation upon an information charging it with a violation of a statute¹⁶ defining trusts and providing "criminal penalties and civil damages, and punishment of corporations, persons, firms, and associations, or persons connected with them, and to promote free competition in commerce and all classes of business, in the State." The ground on which the petitioner mainly relied was that prior to the filing of the information the petitioner had not been legally committed under the provisions of the Penal Code, but this question was declared by the court to be "altogether beside the proposition submitted in this proceeding," and it was also declared that the only question was: "Did the court act in excess of its jurisdiction in the matter of its arraignment of the petitioner?" and it was held that the remedy at law was adequate to move to set aside the information, and "it is a fundamental principle that errors of law cannot be reviewed in a proceeding of the character of the one before us where there is an adequate remedy at law for the correction of such errors. If, therefore, the petitioner was arraigned on an information not founded on a proper commitment, or was otherwise not properly or legally arraigned, the law affords ample remedy for the correction of the error."¹⁷

When a party aggrieved by a judgment has an appeal to the Federal Supreme Court which becomes inefficacious through his neglect, a writ of prohibition to prevent the enforcement of the judgment will not issue to said court.¹⁸

§ 398. Where Act Sought to Be Prohibited Has Been Done.

The writ of prohibition can only be used to prevent the doing of some act which is about to be done, and can never be used as a remedy for acts already completed. Therefore, where the court to which the writ should be issued, has already disposed of the case, so that nothing remains which that court can do,

¹⁶ Cal. Stats., 1907, p. 984.

¹⁷ *Western Meat Co. v. Superior Court*, 9 Cal. App. 538, 99 Pac. 976.

¹⁸ *Cooper, In re*, 143 U. S. 472, 36 L. ed. 432, 12 Sup. Ct. 453.

either by way of executing its judgment or otherwise, no prohibition will be granted. And this is true, though the final disposition of the case was made after service on the judge of a rule to show cause why the writ should not issue; and though other cases of the same character may be pending in the same court.¹⁹

Again, where the case is one in prohibition, and it appears by conclusive evidence *aliunde* that since judgment by dismissal in the lower court the thing sought to be prohibited has been done and cannot be undone by any order of the court, there is nothing remaining but a moot case and the writ of error will be dismissed.²⁰

§ 399. Prohibition to Court Without Jurisdiction or Where It Exceeds Jurisdiction.

A party is entitled to a writ of prohibition as a matter of right where it appears that the court whose action is sought to be prohibited had clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, and that he objected to the jurisdiction at the outset, and has no other remedy.²¹ And if a court assumes jurisdiction of an action when he has by statute been deprived of jurisdiction in that

¹⁹ *United States v. Hoffman*, 4 Wall. (71 U. S.) 158, 18 L. ed. 354. See also *Hiern v. St. Paul*, 104 La. 280, 29 So. 112; *State ex rel. Chappuis v. Marmouget*, 104 La. 1, 28 So. 920.

A writ of prohibition will not be issued to an inferior court in respect of a cause which is finished. *Joins, Ex parte*, 191 U. S. 93, 48 L. ed. 110, 24 Sup. Ct. 27.

²⁰ *Jones v. Montagues*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. 611.

²¹ *New York & Porto Rico Steamship Co., In re*, 155 U. S. 153, 15 Sup. Ct. 183, 39 L. ed. 246; *Rice, In re*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. 194; *Alix, In re*, 166 U. S. 136, 17 Sup. Ct. 948, 41 L. ed. 948.

See the following cases:

United States: Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. 570.

Kentucky: Clark County Court v. Warner, 25 Ky. L. Rep. 857, 76 S. W. 828.

Massachusetts: Tehan v. Brown, 191 Mass. 92, 77 N. E. 313.

New York: People v. Goff, 98 N. Y. Supp. 66, 49 Misc. 72, rev'd 98 N. Y. Supp. 557, 112 App. Div. 424, aff'd in 185 N. Y. 504, 78 N. E. 149.

Virginia: Moss v. Burham, 94 Va. 12, 26 S. E. 388.

West Virginia: Eastham v. Holt, 43 W. Va. 599, 27 S. E. 883.

class of cases he may be restrained by a writ of prohibition.²² So where a court acting in excess of its jurisdiction appoints a receiver who takes possession of property, prohibition will lie.²³

In a recent case in Missouri there was an original proceeding in the Supreme Court to obtain a writ of prohibition to prevent the respondent from further entertaining jurisdiction of a certain injunction suit pending in the court over which he presided, wherein the State at the relation of a circuit attorney was plaintiff and certain railroad companies were defendants. The application for prohibition set out the petition and the amended petition in the injunction proceedings, and also the orders made by the respondent. In the restraining order the defendants were enjoined from charging, exacting or receiving three cents a mile for the transportation of passengers within the State of Missouri and from receiving a higher or greater amount than two cents a mile. A peremptory writ was awarded; and it was held that it was settled doctrine that a writ of prohibition lies as well to prevent an excessive or unauthorized application of judicial force as where a court assumes judicial power not granted by law.²⁴

§ 400. Prohibition to Admiralty Court.

A writ of prohibition will not be issued to a District Court of the United States sitting in admiralty, wherein a libel claiming damages was filed against a steamer for drowning certain

²² *Norfolk & W. Rd. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 41 L. R. A. 414, 30 S. E. 196.

²³ *Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191. See *State ex rel. St. Louis & K. R. Co. v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.

Prohibition in case of excess of jurisdiction, see *State, Bronsard v. Voorhies*, 51 La. Ann. 500, 25 So. 96.

²⁴ *State ex rel. Missouri Pacific Ry. Co. v. Williams*, 221 Mo. 227. This case is also important by reason of other questions decided, viz.: that the State Court could not entertain jurisdiction to defeat the result of an adjudication of the Federal Circuit Court upon the question of rates and fares; also the effect of charges in the bill as to combinations, etc., as concealing the main purpose of the bill; also the right of a circuit attorney to bring suit to enjoin; also the question as to the State being a party; also who are real parties; also the remedy in case of wrongful decision by the Federal Circuit Court.

seamen of a vessel, with which, as she was navigating the public waters of the United States, the steamer, as was alleged, wrongfully collided. That court, having jurisdiction of the steamer and of the collision which is the subject-matter of the suit, is competent to decide whether, under the circumstances, it may estimate the damages which one person has sustained by the killing of another.²⁵

So a writ of prohibition to prohibit judges of the District Court from applying any part of proceeds of sale under decrees of admiralty court of same district of vessels belonging to a bankrupt, and surrendered by the receiver for adjudication of the maritime liens, to the payment of the receiver's expenses and commissions in connection with such vessels, until all maritime liens had been paid in full, will be refused.²⁶

In a Federal case, the facts were as follows:

The collector of customs at the port of New York seized a British built steam pleasure yacht, purchased in England by a citizen of the United States, and duly entered at that port, the seizure being for the alleged reason that the vessel was liable to duty as an imported article. Her owner filed a libel in admiralty against her and the collector in the District Court of the United States for the Southern District of New York, claiming the delivery of the vessel to him and damages against the collector. Under process from the court the vessel was attached and taken possession of by the marshal, and due notice was given. The collector appeared personally in the suit, and put in an answer, and the district attorney put in a claim and an answer in behalf of the United States. The substance of the answers was that the vessel was liable to duty as an imported article. The collector applied to the Federal Supreme Court for a writ of prohibition to the District Court, alleging that that court had no jurisdiction of the suit. The Federal Supreme Court, without considering the question of the liability of the

²⁵ *Gordon, Ex parte*, 104 U. S. 515, 26 L. ed. 814.

²⁶ *Hudson Oil & Supply Co., Matter of*, 214 U. S. 487 (writ denied; no opinion); *Consolidated Rubber Tire Co., Matter of*, 214 U. S. 488 (same facts; no opinion).

vessel to duty, denied the writ on these grounds: The District Court had jurisdiction of the vessel and of the collector; the question whether the vessel was liable to duty as an imported article was *sub judice* in the District Court; the subject-matter of the libel was a marine tort, cognizable by the District Court; it being alleged in the answers, that the vessel was detained by the collector "under authority of the revenue laws of the United States," she was, under the Revised Statutes,²⁷ subject to the order and decree of the District Court; the libelant had no remedy under the Customs Administrative Act,²⁸ and the only way in which the vessel could be brought under the jurisdiction of the court of the United States was by the institution of the libel.²⁹

§ 401. Prohibition—Parties, Generally.

Although a statute³⁰ declares that the writ of prohibition is a counterpart of the writ of mandate, still it is held that the same degree of strictness is not maintained in prohibition as in mandate. So a party seeking relief by writ of prohibition need not necessarily be named as a party in the original action. He may make himself a party by showing that he has an interest in the controversy and by moving to set aside a judgment or order made without or in excess of jurisdiction, and if his motion is denied and an appeal would not be a plain, speedy and adequate remedy, he may have the writ of prohibition issued to protect his rights.³¹

Under the Missouri statute governing the procedure in prohibition the suit need not be brought in the name of the State at the relation of the parties for whom the action is instituted.³²

²⁷ Section 934.

²⁸ Act of June 10, 1890, 26 Stat. 131.

²⁹ Fassett, *In re*, 142 U. S. 479, 35 L. ed. 1087, 12 Sup. Ct. 295, followed in *Eagles, In re*, 146 U. S. 357, 36 L. ed. 1004, 13 Sup. Ct. —.

³⁰ Rev. Stat. Idaho, § 4995.

³¹ *Cronan v. Dist. Court*, 15 Idaho, 184, 96 Pac. 768.

³² *State ex rel. St. Louis & K. R. Co. v. Hinsel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.

EQUITABLE REMEDIES

CHAPTER XXIV

EQUITABLE REMEDIES

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§ 402. Equity, Generally.¹

Chancery jurisdiction is conferred on the courts of the United States by the Constitution under certain limitations, and under these limitations, the usages of the High Court of Chancery, in England, so far as adopted as rules by the Federal Supreme Court, furnish the chancery law which is exercised by the States, and even in those where no State chancery system exists. Under this system, where relief can be given by the English chancery, similar relief can be given by the courts of the Union; and this applies to the right of a person or corporation to proceed against a bridge as a nuisance where such a bridge obstructs navigation.² The Federal Circuit Court may also when sitting in a State, take jurisdiction of a bill brought under a State statute even though such statute may have enlarged the ordinary equitable action to quiet title and remove a cloud.³ So

¹ See §§ 162, 163, herein.

² *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (54 U. S.) 518, 14 L. ed. 249, 18 How. (59 U. S.) 421, 15 L. ed. 435; s. c., 18 How. (59 U. S.) 460, 15 L. ed. 449. See §§ 162, 163, herein.

Equity jurisdiction general and unlimited over corporations, see *Central Iron Works v. Pennsylvania Rd. Co.*, 2 Dauph. Co. Rep. 308, under statute.

³ *Bardon v. Land & River Improv. Co.*, 157 U. S. 327, 15 Sup. Ct. 650, 39 L. ed. 719.

Federal Courts may enforce on their equity or admiralty side new rights or new privileges conferred by State or Territorial statutes as they may enforce new rights of action, given by statute, upon their common-law side, and this applies to a case of fraud.⁴ But said court cannot in the trial of an action at law exercise the powers of a court of equity.⁵ A court of equity has full power to dispose of all questions and grant complete equitable relief as to all matters within the bill when properly before the court on the pleadings and fairly within the issues, provided it has obtained equity jurisdiction on a distinct ground of equity.⁶ So an attachment lien may properly be protected in equity.⁷ Equity has also the power to determine riparian rights as between prior and subsequent appropriators.⁸ And resort may be had to equity to prevent the violation of the right to exercise an exclusive ferry franchise.⁹

A court of equity has jurisdiction whether the statute conferred it or not to inquire into the validity of the election of corporation directors and to set the same aside if not made in conformity with law.¹⁰ Stockholders are also entitled to invoke equitable protection against a by-law increasing the powers of officers and directors which regulate the internal affairs of corporations and the management thereof, unless it appears that such by-law was legally adopted.¹¹ Again, equity may compel a corporation to deliver certificates of shares of capital

⁴ *Cowley v. Northern Pac. Rd. Co.*, 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. 127.

⁵ *Security Trust Co. v. Black River National Bank*, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. 52.

⁶ *Elk Fork Oil & Gas Co. v. Jennings* (U. S. C. C.), 84 Fed. 839.

⁷ *Montana Nat. Bank v. Merchants' Nat. Bank*, 19 Mont. 586, 49 Pac. 140, 61 Am. St. Rep. 532.

⁸ *Becker v. Marble Creek Irrig. Co.*, 15 Utah, 225, 49 Pac. 892, 1119.

⁹ *Murray v. Menefee*, 20 Ark. 561.

¹⁰ *Wright v. Central California Water Co.*, 67 Cal. 532, 8 Pac. 70, citing *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S. C. C.) 525; *Webb v. Ridgely*, 38 Md. 364; *Walker v. Devereaux*, 4 Paige (N. Y.), 225. See *Keen v. Union Water Co.*, 52 N. J. Eq. 813, 31 Atl. 282. See § 260, herein.

¹¹ *Weinburgh v. Union St. Ry. A. Co.*, 55 N. J. Eq. 640, 37 Atl. 1026.

Internal management of corporations—general rule, see § 260, herein. *Examine Hartley v. Welsh*, 8 Pa. Dist. R. 546, 23 Pa. Co. Ct. R. 78.

stock in accordance with an agreement with a transferrer of property to the corporation upon consideration of the issuance of stock therefor.¹² But a stockholder in an insolvent corporation, who has paid his stock subscription in full by a transfer of a tract of land, in good faith, at an agreed value, for the use of the company's business, is not liable in equity to a creditor of the corporation who had knowledge of it and assented to the transaction at the time it took place, solely upon the ground that the land turned out to be of less value than was agreed upon.¹³

§ 403. When Equity Is Without Jurisdiction, Generally.

If the complainant has no right to any equitable relief whatever a suit will not be retained in equity in order to give legal relief.¹⁴ And equity has no jurisdiction to fix a schedule of prices to be charged by a public warehouseman for receiving, storing and handling goods, and in the absence of any other ground of equitable relief will not assume jurisdiction merely on the question of the reasonableness of the rates.¹⁵ So a decree in chancery will not issue to compel a railroad company, without power express or implied to own and operate a public warehouse, to contract with a third person to carry on the business.¹⁶ Nor can equity adjudge a forfeiture of property under the Anti-trust Act of 1890.¹⁷

§ 404. Equity Jurisdiction—Parties, Generally.¹⁸

The general rule in equity is that all persons materially in-

¹² *Davenport v. Piano Imp. Co.*, 79 Ill. App. 161, 2 Chic. L. J. Wkly. 258. *When stockholder may and may not sue in equity*, see § 268, herein.

¹³ *Bank of Fort Madison v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. ed. 725. See § 298, herein.

¹⁴ *Boston Blower Co. v. Carman Lumber Co.*, 94 Va. 94, 26 S. E. 390.

¹⁵ *Gulf Compress Co. v. Harris, Cortner & Co.*, 108 Ala. 343, 48 So. 577. See § 145, herein.

¹⁶ *People v. Illinois Central Rd. Co.*, 233 Ill. 378, 122 Am. St. Rep. 181, 84 N. E. 368.

¹⁷ *United States v. Addyston Pipe & Steel Co.*, 83 Fed. 271, 54 U. S. App. 723, 29 C. C. A. 141, 46 L. R. A. 122. See § 186, herein; see also as to this statute, note 43 to § 11, herein; see also as to Antitrust Acts the next following chapter, herein.

¹⁸ See §§ 229, 268, 269, 422, herein.

terested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it; and the established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter, who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings nor suggested by counsel.¹⁹ So acts in excess or abuse of corporate franchises and privileges resulting in private injuries may be restrained at the suit of private parties.²⁰ And a person in possession, claiming title under a tax deed under which he had obtained title, may institute a suit in equity to quiet title and remove a cloud, where the State statute has enlarged the ordinary equitable action in such a suit.²¹ So a person in possession of the surface of a mining claim under a patent from the United States is presumably in possession of all beneath the surface and ²² may maintain an action in equity to quiet title to a vein beneath, and to enjoin the removal of ore therefrom.²³

In case a State has constructed lines of railroad and canal, and other means of travel and transportation, which would be injured in their revenues by an obstruction in a navigable river, created by a bridge structure, it has a sufficiently direct interest to sustain an application to the Federal Supreme Court in the exercise of original jurisdiction, for an injunction to remove the obstruction.²⁴ But where it is proposed to construct or

¹⁹ *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. 308.

²⁰ *Madison, City of, v. Madison Gas & Electric Co.*, 129 Wis. 249, 108 N. W. 65, citing numerous cases.

²¹ *Bardon v. Land & River Improv. Co.*, 157 U. S. 327, 15 Sup. Ct. 650, 39 L. ed. 719.

²² Under § 3511, Rev. Stat. Utah.

²³ *Lawson v. United States Mining Co.*, 207 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. 585, following *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. 427, distinguishing *Boston & Montana Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co.*, 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. 434.

²⁴ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (54 U. S.) 518, 14 L. ed. 249.

extend a street railroad from one town to another, which would parallel a steam railroad, the latter has not sufficient interest to entitle it to an injunction to restrain such construction or extension, merely upon the ground that the line deviates from the route authorized by the charter of the companies proposing to build such street railway lines, but if the finding of public convenience and necessity, required by the statute in such cases, has not been made, then the railway company, whose line would be paralleled, has sufficient interest to maintain an action to enjoin such construction or extension.²⁶ Again, any member of a mutual insurance company suing for himself and others similarly situated, may invoke equity jurisdiction to redress or prevent any wrong injuriously affecting the property rights of the corporation when its officers will not move appropriately to that end.²⁶

In determining to what extent a court of equity will permit a stockholder to maintain a suit nominally against a corporation, but really for its benefit, the court, where a bill is filed by a stockholder to enjoin the officers of a corporation from paying a tax as required by a statute of the United States, will examine the bill in its entirety and determine whether, under all circumstances, the plaintiff has made such a showing of wrong on the part of the corporation as will justify the suit, and, if it appears that the suit is collusive or that the plaintiff has not done everything which ought to have been done to secure action by the corporation and its directors, and justify, under the assumption of a controversy between himself and the corporation, his prosecution of a litigation for his benefit the bill will be dismissed.²⁷

Where the owner of the compress and warehouse leased the

²⁶ *New England R. Co. v. Central R. & E. Co.*, 69 Conn. 47, 36 Atl. 1061.

²⁶ *Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031, 1135, 115 Am. St. Rep. 1023, 3 L. R. A. (N. S.) 653.

²⁷ *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. 157, holding that *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. 673, does not determine the extent to which a court of equity will proceed in such a case. See *Stewart v. Washington & Alaska Gold Min. Co.*, 187 U. S. 466, 47 L. ed. 261, 23 Sup. Ct. 161.

same to a corporation engaged in a general storage and compress business for a term of years, and a schedule of maximum charges were fixed in the lease, a third person engaged in the business of buying and selling and shipping cotton at that point had no such interest in the lease as would entitle him to enforce the provisions fixing the maximum charges, nor was he entitled in equity to compel the corporation to comply with such provision on the ground that the contract was made for his benefit.²⁸ If a reformation of and the recovery of the amount due upon an insurance policy is sought, it is not necessary to make the insured and the payee, as interest should appear, parties to such suit where both have transferred their right, title and interest to an assignee.²⁹ Reformation of a contract of pledge may be decreed against a bankrupt and his assignee upon a suit instituted against the pledgor after his bankruptcy.³⁰

Where a plaintiff, suing as a stockholder of a street railroad corporation, claims in his complaint that he has been defrauded of a portion of his interest in the corporate assets by means of a lease made by the directors and approved by the vote of a required number of stockholders, and seeks to set aside the lease, to compel the transfer of all the property covered by the lease, and to require the lessee to account to the lessor for all moneys received from the operation of the road, the action is not for the benefit of the plaintiff alone, but is representative in character, and for the benefit of the plaintiff and all other stockholders similarly situated.³¹

§ 405. What Is Not and Is a Condition Precedent to Suit—Quieting Title—Specific Performance.

Although a Code provision requires existing corporations to file a certified copy of its articles of incorporation in the office of the county clerk of every county in the State except the county where the original articles of incorporation are filed, a

²⁸ *Gulf Compress Co. v. Harris, Cortner & Co.*, 108 Ala. 343, 48 So. 577.

²⁹ *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103 Iowa, 465, 72 N. W. 674.

³⁰ *First Nat. Bank v. Bacon*, 98 N. Y. Supp. 717, 113 App. Div. 612.

³¹ *Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493, 53 N. E. 520, aff'g 41 N. Y. Supp. 566, 9 App. Div. 269. See § 257, note 75.

corporation which had, prior to the enactment of said Code provision, substantially complied with the then law by filing its original certificate of incorporation in the county wherein its principal place of business was located, and had also before said Code enactment acquired title to land, may subsequently maintain an action to quiet title to the land as it is within the exception above stated.³²

If specific performance is sought and a statute provides that no corporation shall have or exercise any corporate powers until a bonus tax is paid on the amount of its capital stock, it has not until such tax is paid such a legal existence as to entitle it to maintain a suit, even though it is liable in an action by the State to recover such tax; nor will such corporation be entitled to prosecute a suit, although it pays such tax after the suit is instituted.³³

§ 406. Equity—Adequate Remedy at Law.³⁴

When a judicial act is in any particular contrary to the principles of equity, the fact that there may be a remedy at law on other grounds is not generally a sufficient reason to prevent equity from interposing its appropriate remedy on grounds not available at law.³⁵ So although a township ordinance granting powers and franchises to a street railway corporation provides that the township may adjudge a breach of duties and obligations and declare a forfeiture, an order passed pursuant thereto, declaring a forfeiture and decreeing a sale of the corporate property, is judicial in its character, and equity has the same power to intervene and modify the proceeding as it would have

³² *San Diego Gas Co. v. Frame*, 148 Cal. 252, 82 Pac. 1049. See §§ 198, 237, herein.

Conditions precedent to suit: demand upon and refusal of corporate authorities; exhausting remedies. See §§ 301-312, herein.

³³ *Maryland Tube & Iron Works v. West End Improv. Co.*, 87 Md. 207, 39 Atl. 620, 39 L. R. A. 810, a case of a bill for specific performance of an agreement to convey land.

³⁴ See §§ 163-165, herein.

³⁵ *North Jersey St. Ry. Co. v. South Orange*, 58 N. J. Eq. 83, 43 Atl. 53.

Mere apprehension that judgment at law will not be available is insufficient to give equity jurisdiction. See *Strang v. Richmond P. & C. R. Co.* (U. S. C. C.), 93 Fed. 71.

to interfere in a proceeding in a court of law.³⁶ But a court of equity is without jurisdiction to grant relief against a public warehouseman exacting overcharges for storage, since an action for money had and received gives a complete and adequate relief. So unless jurisdiction is conferred by statute, a court of equity is without jurisdiction of a cause where a plain and adequate legal remedy exists; and where a wrong can be compensated by money, a court of equity will not assume jurisdiction because of such adequate legal remedy; where the question is one of damages to individual or property rights, the damage must be in its nature irreparable or incapable of money measurement, to warrant the assumption of jurisdiction by a court of equity, unless coupled with some other independent matter of equitable cognizance.³⁷

Nor has a court of equity jurisdiction to enforce the collection of tolls by a bridge company from a street railway company which has a charter right to use the bridge of the bridge company, merely because a decree had been entered fourteen years before at the instance of the bridge company, fixing a certain rate of tolls to be paid by the railway company for a period of five years. Such tolls in arrears, like rent in arrears, can only be collected in an action at law.³⁸ And no adequate remedy at law exists to redress the wrong done to a railroad company by wrongfully dealing in vast numbers of its nontransferable rate excursion tickets which will deprive the company of its right to resort to equity to restrain such wrong dealings.³⁹

§ 407. Contract for Co-operation in Procuring Municipal Franchise—Validity of—Public Policy—Equity—When Remedy at Law Adequate—Illustration.

In a case in the Federal Supreme Court the following facts appeared: H. and S. were engaged separately, each on behalf of

³⁶ *North Jersey St. Ry. Co. v. South Orange*, 58 N. J. Eq. 83, 43 Atl. 53.

³⁷ *Gulf Express Co. v. Harris, Cortner & Co.*, 108 Ala. 343, 48 So. 577.

³⁸ *Pittsburg & West End Ry. Co. v. Point Bridge Co.*, 223 Pa. 133, 72 Atl. 348.

³⁹ *Bitterman v. Louisville & Nashville Ry. Co.*, 207 U. S. 205, 206, aff'g 144 Fed. 34.

himself and his associates, in seeking from the city government of Richmond a concession for a street railway with collateral lines. H.'s organization was to be called the Richmond Conduit Company and Shield's the Richmond Traction Company. H. made a deposit of money in a bank in Richmond to aid in his projects. H. and S. then contracted in writing as follows, each being fully authorized thereto by his associates: "We hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expense may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise. The deposit already made with the State Bank of Richmond, by Hyer and his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Hyer with the depositor after the seventeenth day of August, 1895; and further; it is agreed that the application and franchise to be presented to the common council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system." A full statement of the action of the two companies was made to the Richmond authorities. H. fully performed his agreements. He was unable to go to Richmond when the matter was settled, and S. secured the concession for himself and his associates, and refused to permit H. and his associates to participate in it. By bill in equity, amended bill and supplemental bill, H. sought to be declared owner in one-half interest in the traction company's franchise, property and stock, and for a decree securing the possession and enjoyment thereof. It was held that, without deciding whether the contract sued on was, under the facts and circumstances disclosed, void as against public policy, the case presented was not one which called for the interposition of a court of equity; but that the plaintiff's remedy was by an action at law.⁴⁰

⁴⁰ Hyer v. Richmond Trac. Co., 168 U. S. 471, 42 L. ed. 547, 13 Sup. Ct. 14-

§ 408. Adequate Statutory Remedy—Application to Municipal Body as Condition Precedent to Equity Suit—Rate Regulation.

It is a general rule that a party must exhaust all his legal remedies before he is entitled to redress in a court of equity.⁴¹ While this rule has application to legal remedies enforceable in an action at law, there seems to be no good reason why the general principle may not be extended so as to require parties who are afforded by statute an opportunity to obtain adequate relief by application to a legislative or administrative municipal body, like a Board of Supervisors, with reference to the very matter of which they complain in an action in equity, to seek that relief from such body before being permitted to maintain an equitable action for such purpose. And this applies where a water company seeks to have orders, establishing maximum water rates, made by a Board of Supervisors, declared void, and to enjoin the defendants from attempting to put in force or enforcing the rates established by them, on the ground that the same are unfair and unreasonable, and the plaintiff has, under a statute, the right to have them changed or modified in the first instance by application to the Board of Supervisors of the county, and has had ample opportunity to do so, without applying to a court of equity for redress. But such a company is entitled to a fair and reasonable compensation, that is, to a fair return on the reasonable value of his property at the time it is being used for the public benefit,⁴² and while a statute makes it the duty of said Board of Supervisors to establish this fair compensation by just and reasonable rates, still, if it does not do so originally, a court of equity may, where such enactment makes the rates first established unalterable for at least a year, be resorted to at once by the aggrieved person or corporation to have the order establishing them declared null and void. All that the court of equity can do, however, in such case, is to decree that the established rates are unreasonable and restrain

⁴¹ See §§ 301-312, herein.

⁴² See on this last point § 34, herein.

their collection. It has no power to establish rates⁴³ or to restrain the Board of Supervisors from again fixing them so that the mere annulment of the order would be all that equity would accomplish. But if more than a year had elapsed and the corporation affected by the establishment of such rates has made no attempt, by petition to said board, as provided by statute, for readjustment of the rates, its action in equity cannot be maintained, as above stated.⁴⁴

§ 409. Irreparable Injury.

When a city attempts to destroy, by enforcement of an ordinance, the franchise of a railroad company in which the public has an interest, and where the injury to the company will be irreparable, the validity of the franchise depending upon the construction of a grant from the city authorized by the company's charter, the railroad company need not establish its right at law before equity will interfere by injunction to restrain the enforcement of the ordinance; the construction of the grant being for the court, the right of the company is not in law doubtful.⁴⁵ And where a bridge over a navigable river is a nuisance, if the obstruction is unlawful and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of equity.⁴⁶

A dealer cannot invoke equity to restrain the asking and collecting of overcharges on the theory that he will suffer irreparable injury, where such overcharges are too small to warrant the conclusion that the dealer's business would be

⁴³ As to this last point see § 145, herein.

⁴⁴ *San Joaquin & Kings River Canal & Irrig. Co. v. Stanislaus*, 155 Cal. 21, 99 Pac. 365, considering *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 441, 23 Sup. Ct. 571, 47 L. ed. 892 (where the same statute was considered).

Where redress must first be sought: jurisdiction of courts; interstate commission; rates injunction, see § 134, herein; same as to railroad commissions, see § 151, herein.

⁴⁵ *Syllabus in Port of Mobile v. Louisville & Nashville R. Co.*, 84 Ala. 116, 4 So. 106, 5 Am. St. Rep. 342.

⁴⁶ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (54 U. S.) 518, 14 L. ed. 249.

ruined thereby, and hence, the dealer is not entitled to injunctive relief.⁴⁷ Before a court of equity will in any way aid a party to thwart the intent of Congress, as expressed in a statute requiring payment of a tax, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury. And if the party primarily and directly charged with a tax is unable to make a case for the interference of a court of equity no one subordinatedly and indirectly affected by the tax should be given relief unless he shows not merely irreparable injury to the tax debtor as well as to himself, but also that he has taken every essential preliminary step to justify such claim of right to act in behalf of such tax debtor.⁴⁸

§ 410. Multiplicity of Suits.

The prevention of a multiplicity of suits and actions is a well-known ground of equity jurisdiction. So where there is a case of common interest in all of the plaintiffs against the defendant for an alleged wrong committed by the defendant against all of the plaintiffs, the above principle applies.⁴⁹ Thus, where there is a continuing trespass by a number of parties and an action at law could only determine a particular controversy at a particular time, a court of equity may meet such an unusual emergency and by comprehensive decree determine finally the controversy between the parties, and conserve the public interests. So a railroad company can maintain a suit against hackmen combined together in disregard of its regulations, and enjoin them from congregating upon the sidewalk, adjacent to its terminal in a city, so as to interfere with the ingress and egress of passengers. But the rights of a railroad company as abutting owner of the sidewalks adjacent to the property on which its station stands and those of its passengers are not paramount to the rights of the general public to legitimately use

⁴⁷ *Gulf Compress Co. v. Harris, Cortner & Co.*, 108 Ala. 343, 48 So. 577.

⁴⁸ *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. 157.

⁴⁹ *Breimeyer v. Star Bottling Co.*, 136 Mo. App. 84, 117 S. W. 119.

the sidewalk, and licensed hackmen, unless forbidden by local regulations may, within reasonable limits, use a public sidewalk in properly prosecuting their calling, so long as such use does not obstruct others in legitimately using it upon equal terms.⁵⁰ But a complainant who can obtain all the relief to which he is entitled in a single suit cannot invoke the interference of a court of equity on the ground that defendant may be saved a multiplicity of suits against it by others situated similarly to himself.⁵¹ And, as a person engaged in the business of buying and selling cotton who pays overcharges for the storage of cotton in a public warehouse, may recover in one action all of the overcharges paid for the cotton season, or may maintain several actions at law therefor, equity is without jurisdiction to give relief on account of preventing a multiplicity of suits.⁵²

Again, where the defendant gathers together the bottles and siphons of different several plaintiffs indiscriminately, and, using them as its own, refills them with its product, and puts this product upon the market at a lower price than it is possible for the plaintiffs to do, by reason of the fact that the defendant is able to buy up such bottles or get possession of them at a very low figure and unfair competition results by thus using the several plaintiffs' containers and selling to the public goods not the manufacture of plaintiffs, and of an inferior quality, a wrong is presented, the redress of which is peculiarly within the power of a court of equity, and allegations in a petition to substantially the above effect, set out a case of an injury against each and all of the plaintiffs indiscriminately, for which they have a common remedy.⁵³ Multiplicity of suits as the ground of an action in equity, brought by a receiver to recover losses sustained by a corporation by reason of the negligent and

⁵⁰ *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. ed. 192, cited in *Bitterman v. Louisville & Nashville Rd. Co.*, 207 U. S. 205, 228, 52 L. ed. 171, 28 Sup. Ct. 91.

⁵¹ *Equitable Life Assurance Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. 404, rev'g 151 Fed. 1.

⁵² *Gulf Compress Co. v. Harris, Cortner & Co.*, 108 Ala. 343, 48 So. 577.

⁵³ *Breimeyer v. Star Bottling Co.*, 136 Mo. App. 84, 117 S. W. 119.

wrongful acts of its directors, is not sufficiently shown by the fact that all the directors holding office during the period of time over which the losses and claimed negligent and wrongful acts extended cannot be made defendants in one suit and that said acts are in number and character such as to necessitate a discovery; such an action should be brought at law.⁵⁴

§ 411. Fraud and Trusts.

Fraud and trusts are also subjects peculiarly within the jurisdiction of courts of equity, and the relief granted in a proper case will be comprehensive.⁵⁵ A court of equity also has jurisdiction to prevent a threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits.⁵⁶

§ 412. Reformation of or Relief from Written Instruments or Contracts.

The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted, but to justify such reformation the evidence must be sufficiently cogent to satisfy the mind of the court, and this applies to corporations.⁵⁷ So where, by mistake, accident or inadvertence, a policy of insurance does not correctly set forth the contract personally made between the parties, equity may reform it so as

⁵⁴ *Dykman v. Keeney*, 154 N. Y. 483, 48 N. E. 894, rev'g 47 N. Y. Supp. 352, 21 App. Div. 114.

⁵⁵ *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241, 35 N. Y. St. Rep. 316, 26 N. E. 548.

⁵⁶ *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. 673. This case is held not to determine to what extent a court of equity will permit a stockholder to maintain a suit nominally against but really for its benefit. *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. 157.

⁵⁷ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. 239. See *Nebraska Loan & Trust Co. v. Ignowski*, 54 Neb. 398, 74 N. W. 852.

Mistake of law without mistake of fact no ground for reformation where no fraud, etc. *Deseret Nat. Bank v. Burton*, 17 Utah, 43, 53 Pac. 215. See *Wisconsin Marine & F. Ins. Co. Bank v. Mann*, 100 Wis. 596, 76 N. W. 777.

to express the real agreement.⁵⁸ But reformation of a contract of insurance will not be decreed where the insurer's agent who entered into said contract had no authority in the premises to make said contract in the form in which it was made.⁵⁹

The jurisdiction of a court of equity will also be maintained in a suit to determine title, when a part of the remedy sought is to supply what was by mistake omitted from one of the title deeds; or to establish a lost deed, even though in the latter case proof of the fact might have been allowed to be made in an action at law.⁶⁰ And where a reservation of a railroad right of way has been omitted from a deed of land reformation may be decreed in equity on the ground of mutual mistake.⁶¹

So where a suit was brought by a bank against a certain party and his trustee in bankruptcy to procure the reformation of a written contract between said bank and the bankrupt regarding a holding of certain shares of stock by said bank as collateral security it was held that, the jurisdiction which equity has to decree correction of errors in written contracts caused by mutual mistake is not suspended by the bankruptcy law; and the trustee takes property as the debtor had it at the time of the petition subject to all valid claims, liens and equities, including the power of a court of equity to correct a manifest error by mutual mistake in an agreement made prior to the petition. And it was also held that where a contract is reformed to correct a mutual mistake and make it conform to the intent of the parties a new lien is not created, but the original lien is adjudicated and determined.⁶² In an action at law for personal injury equity may, in aid thereof, reform a release notwithstanding a claim of laches in instituting the action, provided

⁵⁸ *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287. See *New York Life Ins. Co. v. McMaster* (U. S. C. C.), 87 Fed. 63, 57 U. S. App. 638, 30 C. C. A. 532.

⁵⁹ *Vardemann v. Penn Mut. Ins. Co.*, 125 Ga. 117, 54 S. E. 66.

⁶⁰ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. 239.

Reformation of unrecorded deeds; intervening rights, see New Orleans Canal & Bkg. Co. v. Montgomery, 95 U. S. 16, 24 L. ed. 346.

⁶¹ *Dennis v. Northern Pac. Ry. Co.*, 20 Wash. 320, 55 Pac. 210.

⁶² *Zartman v. First National Bank*, 216 U. S. 134, 30 Sup. Ct. —, 54 L. ed. —, aff'g 189 N. Y. 533.

a reasonable excuse therefor exists and defendant will sustain no loss of material evidence.⁶³

Again, where a corporation, which had entered into a contract with the government, received notice of its renewal, which, among other things, stated that no application for such contracts would be considered from persons not already having one, and the corporation applied for and received a renewal contract which, when delivered, contained no provision for not giving contracts to persons not engaged in the business to which the contract related, and during its life such a contract was given to such a person and the corporation sued for reformation of the contract, on the ground of mutual mistake in such omission, and also for the loss of profits on business diverted to such person it was held that although jurisdiction existed to reform the contract there was no such mutual mistake as to justify the reformation asked.⁶⁴ So where each and all of the individuals who organized a corporation under a State law had knowledge or actual notice, of a defect in the title to lands acquired by the corporation through them, their knowledge or actual notice is knowledge or notice to the company, and if constructive notice binds them it binds the company.⁶⁵ Equity may also on the ground of fraud grant relief from a contract to purchase reissued stock induced by the misrepresentations of the corporate officers concerning the existing condition of said stock.⁶⁶

§ 413. Accounting.

An action lies in equity for an accounting in favor of a stockholder against a corporation to ascertain amounts due between

⁶³ *Wabash Ry. Co. v. Lumley*, 96 Fed. 773, 37 C. C. A. 584.

⁶⁴ *United States v. Milliken Imprinting Co.*, 202 U. S. 168, 26 Sup. Ct. 572, 50 L. ed. 980, rev'g 40 Ct. Cl. 81. While the judgment was reversed upon the merits, it was held (the action being in the court of claims originally) that while reformation of the contract is not an incident to an action at law, and can only be granted in equity (under § 1 of act of March 3, 1887, 24 Stat. 505) the court of claims has jurisdiction to reform a contract.

⁶⁵ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. 239.

⁶⁶ *Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708, 37 Atl. 741.

them;⁶⁷ to determine the amount of profits realized by a corporation from the use of a cannery of its debtor held under an agreement as security for a debt due;⁶⁸ in favor of the owners of an interest in an oil lease against parties owning the balance where the latter kept the accounts;⁶⁹ at the suit of bank depositors against directors where funds have been wasted;⁷⁰ in favor of a resident stockholder against a foreign corporation and its officers where property is wrongfully taken;⁷¹ and where there are mutual accounts and accounts on one side greatly involved and complicated.⁷² The court may also require a receiver to account for funds in his hands and may charge him with interest on so much thereof as he on receiving deposited in a bank to his credit as receiver, and then withdrew and deposited on his private account in another bank, he declining to explain the transaction.⁷³ And where a bill alleges that complainant has paid money to a corporation under a contract not wholly illegal, supposing it was legal and acting in good faith, while defendants knew that the business to be transacted under the contract was a cheat and a fraud, the parties are not in *pari delicto*, and equity has jurisdiction to compel an accounting.⁷⁴

So a demurrer to a bill on the ground that complainant has an adequate remedy at law should be overruled, where the bill alleges that defendants, the directors and stockholders of a corporation, conspiring together, obtained complainant's money by means of fraud, that the corporation did a large business, is

⁶⁷ *Schuets v. German-American Real Estate Co.*, 47 N. Y. Supp. 500, 21 App. Div. 163.

⁶⁸ *Peninsular Trading & F. Co. v. Pacific Steam Whaling Co.*, 123 Cal. 689, 56 Pac. 604.

⁶⁹ *Harrington v. Florence Oil Co.*, 178 Pa. St. 444, 35 Atl. 865.

⁷⁰ *Meisse v. Loren*, 6 Ohio Dec. 258, 4 Ohio N. P. 100.

⁷¹ *Ernst v. Rutherford & B. Springs Gas Co.*, 56 N. Y. Supp. 403, 38 App. Div. 389.

⁷² *Gleason Mfg. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 143, aff'g 63 Ill. App. 294.

⁷³ *Hinckley v. Railroad Co.*, 100 U. S. 153, 25 L. ed. 591.

⁷⁴ *Edwards v. Michigan Tontine Investment Co.*, 132 Mich. 1, 92 N. W. 491.

insolvent, that defendants have converted the money taken in by the corporation, and prays for an accounting, and an examination of the books.⁷⁵ Equity also has power to modify a decree directing an accounting.⁷⁶

§ 414. Corporation Mortgages—Enforcement of—Foreclosure—Rights and Remedies of Parties—General Instances.

Limitations upon the power of a trustee in a railroad mortgage to take proceedings to enforce payment of the amount secured should be construed strictly.⁷⁷ If holders of notes, of a corporation, secured by mortgage of its realty, agree to convert their notes into stock upon a condition which fails, the right to foreclose the mortgage is not affected by the agreement.⁷⁸

A mortgage, given to secure a large number of bonds, provided that the bonds should become payable if any execution should be sued out against the property of the company, and such company should not forthwith pay the same. A bondholder brought suit before a justice of the peace upon six

⁷⁵ *Edwards v. Michigan Tontine Investment Co.*, 132 Mich. 1, 92 N. W. 491. The court in the principal case said: "The second important ground for demurrer is that complainant has a complete and adequate remedy at law; counsel citing, among others, *Rehberg v. Surety Co.*, 131 Mich. 135, 91 N. W. 132; *Barney v. Surety Co.*, 131 Mich. 192, 91 N. W. 140. It is not always true that, because a remedy might be pursued upon the law side of the court, the chancery side may not also have jurisdiction. The bill alleges that complainant's money was obtained from her by means of fraud; that defendants conspired together, and were parties to the fraud; that a large business was done by the corporation; that it is insolvent; that defendants have converted the money taken in by the corporation, including the complainant's money, to their own use; that an accounting is necessary, and an examination of the books of the corporation. If the case stated in the bill is true,—and it must, on demurrer, be deemed to be true,—under the repeated decisions of this court the chancery side of the court has jurisdiction," per Moore, J. See also *Bale v. Michigan Tontine Invest. Co.*, 132 Mich. 479, 93 N. W. 1071.

⁷⁶ *Webster v. Oliver Ditson Co.* (U. S. C. C.), 171 Fed. 895.

⁷⁷ *Guaranty Trust & S. D. Co. v. Green Cove S. & M. R. R. Co.*, 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. 512.

⁷⁸ *Pugh v. Fairmount Gold & Silver Min. Co.*, 112 U. S. 238, 28 L. ed. 712, 5 Sup. Ct. 113.

coupons. The defendant company consented to a judgment and to the issue of an execution; and upon the same day the trustees gave notice that, by reason of such execution having been unpaid, they declared the principal and interest upon all the bonds to be immediately payable; and at once took possession of the property. It was held that while these proceedings were taken by connivance and consent of the parties, they were not collusive in a legal sense, as the debt was honestly due and the plaintiff entitled to the judgment. It was also held that while the judgment was obtained for the obvious purpose of enabling the trustees to declare the mortgage to be due, the court would not inquire into the motives of the parties.⁷⁹

In foreclosure, the proceedings being *ex parte*, by order of court, to sell property burdened with mortgage or privilege, the creditor must bring his claim within the terms of the law.⁸⁰ So a provision in a mortgage that the mode of sale provided by it "shall be exclusive of all others" is an attempt to provide against a remedy in the ordinary course of judicial proceedings and oust the jurisdiction of the courts, and is therefore invalid.⁸¹ Where a bill is filed to foreclose a mortgage, and the answer admits the bonds secured by such mortgage to have been issued, it is not necessary that the bonds should be put in evidence before a decree of foreclosure and sale.⁸² Where a director prevents a corporation from organizing by alleged misrepresentations, other directors who refused on account thereof to enter into the organization cannot, in the corporate name, avail themselves of the defense, against a mortgage executed by them, that certain results were caused by the proposed company's financial embarrassment and its loss of prospective profits owing to the failure to organize the corporation.⁸³

⁷⁹ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 311.

⁸⁰ *Bank of Leesville v. Wingate*, 123 La. 386, 48 So. 1005.

⁸¹ *Guaranty Trust & S. D. Co. v. Green Cove S. & M. R. R. Co.*, 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. 512.

⁸² *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 311.

⁸³ *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151.

§ 415. Corporation Liens and Mortgages—Equity Jurisdiction of Foreclosure—Conflicting Claims to Possession.

Equity will not take jurisdiction to foreclose a corporation's statutory lien on stock for a stockholder's debt where a not inadequate remedy exists at law.⁸⁴ Where a State law gives either an action at law or a remedy in equity to enforce a mechanic's lien, proceedings in a Federal Court to enforce it may be had in equity.⁸⁵ Where a railroad forming a continuous line and located in two adjoining States is mortgaged by a *de facto* or *de jure* corporation of which the courts of one of said States has jurisdiction and the mortgage consists of bonds of the corporation the Superior Court of the county in the State having such jurisdiction may make a decree in equity foreclosing the mortgage as to the corporate property located in both States and embraced in the mortgage and may, to effectuate the decree, direct a sale of the entire property and that a proper conveyance be executed to the purchaser by the receiver, the trustee and the mortgagor, and if the adjoining State has in fact incorporated a company which has been under the forms of law consolidated with a *de facto* or *de jure* corporation of the State having jurisdiction as above stated and such consolidated company executed the mortgage and is really a party before the court as mortgagor, such facts may be shown in evidence and the court

⁸⁴ *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 5 Det. L. W. 422, 42 L. R. A. 531, 76 N. W. 371.

Adequate remedy at law, generally, see §§ 163-165, 406-408, herein.

Jurisdiction of Federal Circuit Court of railroad foreclosure suit, see *Grand Trunk Ry. Co. v. Central Vermont R. Co.* (U. S. C. C.), 103 Fed. 740; *Toledo, St. Louis & K. C. R. Co. v. Continental Trust Co.* (U. S. C. C. A.), 95 Fed. 497; *Wheelwright v. St. Louis, N. O. & O. Canal & T. Co.* (U. S. C. C.), 50 Fed. 709; *Beekman v. Hudson River West Shore Rd. Co.* (U. S. C. C.), 35 Fed. 3.

Jurisdiction of Pennsylvania common pleas over foreclosure of mortgage of street railway company, see *Old Colony Trust Co. v. Allentown & B. Rapid Transit Co.*, 192 Pa. St. 596, 44 Atl. 319.

⁸⁵ *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. ed. 853.

When foreclosure in State Court of liens, created by certificate of receiver of railroad corporation, will not be granted by sale of property, see *Passage v. Dansville & Mt. M. R. Co.*, 58 N. Y. Supp. 770, 41 App. Div. 182.

has jurisdiction, the same in all respects over the consolidated company as it would over a corporation created exclusively by the laws of the State so assuming jurisdiction.⁸⁶

In a foreclosure suit the Federal Circuit Court, having jurisdiction of the subject-matter and the parties, appointed a receiver, who, pursuant to its orders, took possession of the mortgaged road. In an action between other parties subsequently brought in a State Court, an attachment was sued out and levied upon the road. Pending an application thereupon made to the Circuit Court, to restrain the plaintiff from further proceeding with his attachment, he and the defendant to the action consented to the removal to the Circuit Court, where, upon a finding that the road was not, at the date of the levy of the attachment, the property of that defendant the writ was dismissed. It was held that the Circuit Court had the right to determine upon the conflicting claims to the possession of the road, and that the parties to the action by consenting to transfer it, did no more in effect, than the court could have compelled them to do.⁸⁷

§ 416. Corporation Liens and Mortgages—Enforcement of—Foreclosure—Parties.

Where the statute so permits an assignee or assignees of persons who have filed railroad liens upon the property may properly bring suit to establish such liens.⁸⁸ An owner of a railroad is a proper party in a suit to charge the property of a railroad company with a lien thereon.⁸⁹ If a holder of one or more series of bonds issued by a railroad company and secured by

⁸⁶ *Georgia Southern & Florida Rd. Co. v. Mercantile Trust & Deposit Co.*, 94 Ga. 306, 21 S. E. 701.

⁸⁷ *People's Bank v. Calhoun*, 102 U. S. 256, 26 L. ed. 101.

⁸⁸ *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 93 S. W. 944, Rev. Stat., 1899, § 4256.

When party having statutory lien cannot intervene, in foreclosure suit against insolvent railroad company, to obtain priority over mortgage debt, see *Van Frank v. St. Louis, C. G. & Ft. S. Ry. Co.*, 93 Mo. App. 412, 67 S. W. 688.

⁸⁹ *Little Rock Trust Co. v. Southern Missouri & A. R. Co.*, 195 Mo. 669, 93 S. W. 944; Rev. Stat., 1899, §§ 4245, 4246, 4248.

mortgage has the right to institute proceedings for foreclosure he is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene but to see that their rights are protected in the final decree.⁹⁰ Where a railroad corporation, by mortgage, whose sufficiency to secure what it is given to secure is doubtful, mortgages its property directly to all its bondholders by name, to secure specifically to each the amount due on the bonds to him, no one bondholder, even when professing to act in behalf of all bondholders who may come in and contribute to the expense of the suit, can proceed alone against the company, and ask a sale of the property mortgaged. He is incapacitated to do this because: (1) The sufficiency of the security being doubtful and it being thus his interest to diminish the amount of debt, in the whole to be paid, all other creditors should have such notice as may enable them to see that on a sale the most possible is obtained for the property mortgaged; (2) even in equity, a suit on a written instrument must be brought in the name of all who are formal parties to it, and retain an interest in it.⁹¹ A bondholder may sue in his own name to foreclose a railroad mortgage to the extent of recovering accrued and unpaid interest where trustees, acting upon the request of bondholders, had sued to foreclose but the suit had been dismissed and said trustees had, before their appeal from such dismissal was determined, refused to renew said litigation.⁹²

Upon a bill to foreclose a railroad mortgage a lessee in posses-

⁹⁰ *New Orleans Pac. Ry. Co. v. Parker*, 143 U. S. 42, 30 L. ed. 66, 12 Sup. Ct. 364.

Foreclosure of mortgages: bondholders' rights—parties, see *Chicago & Vincennes Rd. Co. v. Fosdick*, 106 U. S. 47, 27 L. ed. 47; *Shaw v. Railroad Co.*, 100 U. S. 605, 25 L. ed. 757; *Hotel Co. (Omaha Hotel Co.) v. Wade*, 97 U. S. 14, 24 L. ed. 917; *Gunnison v. Chicago, M. & St. P. Ry. Co. (U. S. C. C.)*, 117 Fed. 629 (when laches insufficient to bar bondholder's right to enforce mortgage); *General Electric Co. v. La Grande Edison Electric Co. (U. S. C. C. A.)*, 87 Fed. 590, 59 U. S. App. 473, 31 C. C. A. 118; *Seibert v. Minneapolis & St. Louis R. Co.*, 52 Minn. 246, 20 L. R. A. 535; *Davis v. New York Concert Co.*, 41 Hun (N. Y.), 492; *Weetzen v. St. Paul & P. R. Co.*, 4 Hun (N. Y.), 529.

⁹¹ *Railroad Co. v. Orr*, 18 Wall. (85 U. S.) 471, 21 L. ed. 810.

⁹² *Beekman v. Hudson River West Shore Rd. Co. (U. S. C. C.)*, 35 Fed. 3.

sion of and the owner of the equity in the mortgaged property are proper parties.⁹³ Although in general, all incumbrancers must be made parties to a bill of foreclosure, yet where a decree of foreclosure and sale was made and executed at the suit of a subsequent mortgagee, and with the consent of the mortgagor, it not appearing that there were any prior incumbrancers, the proceedings will not be set aside, upon the application of the mortgagor, in order to let in a prior mortgagee, who ought regularly to have been made a party, unless it be necessary to prevent irremediable mischief.⁹⁴ Where an action is brought, to foreclose a mortgage, by a railroad company, which is a military and post road, and a receiver has been appointed *pendente lite* to enforce its right to erect its line on the company's right of way, a telegraph company may properly intervene.⁹⁵ A party bidding at a foreclosure sale of a railroad makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree.⁹⁶ A water company does not possess such an interest as to enable it to resist a foreclosure sale for the payment of bonds which its property was mortgaged to secure where it has conveyed its works to another corporation subject to such mortgages and is under no agreement with the grantee for the payment by it of any part of the mortgage debt.⁹⁷

⁹³ *Beekman v. Hudson River West Shore Rd. Co.* (U. S. C. C.), 35 Fed. 3.

⁹⁴ *Finley v. United States Bank*, 11 Wheat. (24 U. S.) 304, 6 L. ed. 480.

⁹⁵ *Union Trust Co. v. Atchison, Topeka & S. F. R. Co.*, 8 N. Mex. 327, 43 Pac. 701.

⁹⁶ *Kneeland v. American Loan & T. Co.*, 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. 950.

When purchaser at foreclosure sale is subject to jurisdiction of Federal Court, see Farmers' Loan & Trust Co. v. Houston & T. C. R. Co. (U. S. C. C.), 44 Fed. 115.

⁹⁷ *American Waterworks Co. v. Farmers' Loan & T. Co.* (U. S. C. C. A.), 73 Fed. 956, 20 C. C. A. 133, 36 U. S. App. 563.

§ 417. Rights of Parties upon Foreclosure of Mortgages—Junior Bondholder—Judgment Creditor—Priorities—Proceeds of Sale—Adjustment of Claim—Accounting—Instances.

A bondholder of a class covered by a railroad mortgage to secure the class of bonds issued in case of insolvency of the obligors cannot, by obtaining judgment at law, be permitted to sell a portion of the property devoted to the common security, as this would disturb the *pro rata* distribution among the bondholders, to which they are equitably entitled.⁸⁸ Where, on the application of the trustee of a railroad mortgage, a receiver is appointed and takes possession of the road and of its rolling stock, and among the latter is rolling stock which the company was operating under lease, and the receiver continues to operate it, its rental at the contract price, and not according to its actual use, if not paid from earnings, will be a charge upon the proceeds of the sale under the foreclosure of the mortgage prior to the mortgage debt.⁸⁹ A company, to secure the payment of its bonds, mortgaged its property, and the rents, issues and profits arising therefrom, with the provision, that, if there was default in paying the interest, the mortgagee might take possession of the property, and manage the same, and receive and collect all rents and claims due and to become due to the company. Default was made; and the mortgagee filed his bill, setting forth that the company had on hand moneys and claims due to it, both of which he prayed might be applied to his mortgage. An execution upon a judgment, which B. had against the mortgagor, having been sued out and returned *nulla bona*, a month later he filed his bill to subject such moneys and claims to the payment of his judgment. It was held that inasmuch as the mortgagee had not taken possession, his claim to the earnings and income on hand at the time of filing his bill must be postponed to that of B.¹ The term "wages of em-

⁸⁸ *Pennock v. Coe*, 23 How. (64 U. S.), 117, 16 L. ed. 436.

⁸⁹ *Kneeland v. American Loan & T. Co.*, 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. 950.

¹ *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144.

ployés," as used in an order directing the payment of certain classes of debts out of the proceeds of the sale of a railroad under foreclosure, in preference to the secured liens, does not include the service of counsel employed for a special purpose. But services of an attorney in securing payment to the receiver of a railroad of rent due for property of the railroad company and the return of the property, are entitled to priority of payment over secured liens on such sale under foreclosure.² Where a mortgage for a certain sum, as four million dollars, was given to trustees to be issued to secure railroad bonds to be issued

² Louisville, E. & St. Louis R. Co. v. Wilson, 138 U. S. 501.

Priority of liens and mortgages, see the following cases: Southern Ry. Co. v. Ensign Mfg. Co. (U. S. C. C. A.), 117 Fed. 417, 54 C. C. A. 591; Niles Tool Works Co. v. Louisville, N. A. & C. Ry. Co. (U. S. C. C. A.), 112 Fed. 561, 50 C. C. A. 390 (when claim for amount due on machinery sold to railroad company no privity over mortgage debt on foreclosure); Gregg v. Mercantile Trust Co. (U. S. C. C. A.), 109 Fed. 220, 48 C. C. A. 318 (what debt is and is not entitled to preference; claims for rental of terminal facilities are not; debt for locomotives, when not; claims for price of certain essential supplies are claims of general creditors, when are; extent of right when diversion of income; attorneys' fees); Kansas Loan & Trust Co. v. Electric Light & Power Co. (U. S. C. C.), 108 Fed. 702 (upon what a preference over mortgagee of one furnishing supplies depends); Columbus, S. & H. R. Co. Appeal of (U. S. C. C. A.), 109 Fed. 177, 48 C. C. A. 275 (mortgage given to secure notes when constitutes junior mortgage to prior mortgages); Metropolitan Trust Co. v. Railroad Equipment Co. (U. S. C. C. A.), 108 Fed. 913, 48 C. C. A. 135 (equipment conditionally sold to railroad company, vendor has first been where mortgagees elect to retain property); Contracting & Bldg. Co. v. Continental Trust Co. (U. S. C. C. A.), 108 Fed. 1, 47 C. C. A. 143 (lender of money to pay interest on railroad mortgage coupons no priority); Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co. (U. S. C. C.), 92 Fed. 246 (claim of guarantor of notes of railroad company not superior to mortgagee; but taxpayer has superior lien); Thomas v. Cincinnati, N. O. & T. P. R. Co. (U. S. C. C.), 91 Fed. 195 (judgment creditors no priority over lessees' mortgagees; when priority given certain judgments over mortgage of rolling stock); Fidelity Ins., T. & S. D. Co. v. Norfolk & W. R. Co. (U. S. C. C.), 90 Fed. 175 (judgment against railroad lessee, based upon tort when not superior to mortgage liens notwithstanding statute giving such judgment against mortgagor superiority); Ten Eyck v. Pontiac, O. & P. A. R. Co., 114 Mich. 494, 4 Det. L. N. 650, 72 N. W. 362 (stockholder's judgment based upon service render no priority over mortgage where stockholder had knowledge); Van Frank v. St. Louis, C. G. & Ft. S. Ry. Co., 93 Mo. App. 412, 67 S. W. 688 (holder of statutory lien when no priority over mortgage debt).

to a like amount, and many other bonds having been issued at a large discount, were, on a claim made against the company, judicially decreed to be entitled to no more than what had been actually given for them, so that a margin remained of the mortgage security, a party who had sold to the company materials used in making the road, and who took in payment some of the bonds at eighty per cent, with an agreement that if the company should at any time sell other bonds at a less rate, he should have as many additional bonds as would pay him for materials in full, estimating the bonds already given and those to be given at the lowest rate at which any had been sold, was held not entitled, the company, which was insolvent at the time of the suit, having sold bonds at forty per cent, to have his equity adjusted on a foreclosure of the mortgage, and his demand attached to the mortgage; bonds to the whole amount of four million dollars having been actually issued.³

§ 418. Foreclosure and Sale of Railroad Mortgage—Distribution of Proceeds—Unsecured Creditors—Bank as General Creditor—Prior Mortgagee.

The rule charging operating expenses of a railroad, debts due from it to connecting lines growing out of an interchange of business, debts due for the operation of leased lines, and, generally, debts created under special circumstances, which make an equity in favor of the unsecured debtor, upon the gross income of the road before a fund arises for the payment of the mortgage interest, is not applicable to a fund realized from a sale of the road under foreclosure of the mortgage; and, as a general rule, unsecured debts of the company cannot, in such case, take precedence over debts secured by prior and express liens, in the distribution of proceeds of the sale of the mortgaged property.⁴ Where, in a suit foreclosing a railroad mortgage, it

³ *Vose v. Bronson*, 6 Wall. (73 U. S.) 452, 18 L. ed. 846.

⁴ *St. Louis, A. & T. H. Rd. Co. v. Cleveland, Chicago, C. & I. Ry. Co.*, 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. 1011. The court held on the proofs in this case: (1) that no gross earnings which should have been applied to the payment of the rent due the appellant were diverted to the payment of interest upon bonds of mortgage bondholders represented in the suit

appeared that money loaned the railroad company by a bank, an intervening creditor at a time when the company was much embarrassed, and shortly before the commencement of the suit, went into the general funds of the company, and not especially to the payment of the mortgage interest, and that there was no fraud or deception on the part of the trustees, and no misuse of current income by the receiver of the road to the injury of the bank, it was held that the bank had only the rights of a general creditor in the distribution of the proceeds from the sale of the mortgaged property.⁵ In a suit in equity to foreclose a mortgage from a railroad corporation of its whole railroad, franchise, lands and property, which have since been put in the possession of a receiver, an intervening prior mortgagee of the lands is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver, or out of the proceeds of a sale made pursuant to the decree of foreclosure, subject to his mortgage.⁶ Where, upon foreclosure of a railroad mortgage for nonpayment of overdue interest a sale is made under the decree and there is a surplus over what is necessary to pay such interest, costs and expenses it may be properly applied to the reduction of the principal sum due upon the bonds and it may be recovered by the trustee with interest, for the bondholders.⁷

§ 419. Foreclosure of Railroad Mortgage—Rights of Purchaser—Title and Obligations.

A mortgage of the franchises and property of a corporation, made in the exercise of a power given by statute confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but, at most, to reorganize as a new corporation subject to the laws existing at the time of the reorganization.⁸ And a

and interested in the distribution of the fund; and (2) that the appellant had no equitable right, as against the appellees, to priority of payment out of the fund.

⁵ Penn v. Calhoun, 121 U. S. 251, 30 L. ed. 915, 7 Sup. Ct. 906.

⁶ Woodworth v. Blair, 112 U. S. 8, 28 L. ed. 615, 5 Sup. Ct. 6.

⁷ Ohio Central Rd. Co. v. Central Trust Co. of N. Y., 133 U. S. 83, 33 L. ed. 561, 10 Sup. Ct. 235.

⁸ Norfolk & W. R. R. Co. v. Pendleton, 156 U. S. 667, 39 L. ed. 574, 15 Sup. Ct. 413.

railway company organized to receive, hold and operate a railroad sold under foreclosure of a mortgage, in the absence of a statute or contract, is not obliged to pay the debts and perform the obligations of the corporation whose property the purchasers buy.⁹ So the sale of a railway in the foreclosure proceedings under the mortgage to a trust company, and the deed made in pursuance thereof, passes the property to the purchaser free from any claims of the creditors of the railway company.¹⁰ In a great public enterprise, such as the building of the Union Pacific Railroad under a congressional charter reserving the right to alter, amend or repeal, public interests, and not simply private purposes are to be regarded, and the purchaser at judicial foreclosure sale takes the property subject to the proper regulations and use established by Congress, notwithstanding the mortgage foreclosed may have antedated the legislation.¹¹

§ 420. Foreclosure and Sale—Reorganization Agreements by Purchasers—Exceptions to Sale—Constitutional Law.

The provisions of a State Constitution that "no private corporation shall issue stock or bonds except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void" does not prevent the carrying out of an agreement between mortgage bondholders of an embarrassed railroad company in that State by which it was agreed that trustees should buy in the mortgaged property on foreclosure, and convey it to a new company to be organized by the bondholders which should issue new mortgage bonds to pay the expenses of the sale, and other new mortgage bonds to be taken by the bondholders in lieu of their old bonds, and full paid up stock subject to the mortgage debt, to be delivered to and held by the bondholders without any payment of money.¹²

⁹ *Hoard v. Chesapeake & O. Ry.*, 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. 74. See §§ 238-240, herein.

¹⁰ *McKittrick v. Arkansas Cent. Ry. Co.*, 152 U. S. 473, 38 L. ed. 518, 14 Sup. Ct. 661.

¹¹ *Union Pacific Rd. Co. v. Mason City & Fort Dodge Rd. Co.*, 199 U. S. 160, 26 Sup. Ct. 19, 50 L. ed. 434.

¹² *Memphis & L. R. Rd. Co. v. Dow*, 120 U. S. 287, 30 L. ed. 595, 7 Sup. Ct. 482.

Where there had been a foreclosure and sale under a railroad mortgage to secure certain bonds, exceptions to the sale were refused to be entertained in favor of such of the bondholders as had been parties to a scheme under which the sale had been made for the formation of a new company, and had surrendered their bonds in exchange for stock and bonds of such new association.¹³

§ 421. Injunction, Generally—Instances.

A clear case must be presented upon the papers before the court before a preliminary injunction will be granted in a Federal Court.¹⁴ The rights of the parties are not determined by a temporary injunction. It has in view for the purposes of the case a probable right and a probable danger, so that the court need be satisfied only that such right may be defeated without a restraining order and that if it grant such order less injury will result to the respondent than to the complainant.¹⁵

If a State injure one incorporated company by the unlawful grant of a charter to another and rival one, the remedy of the first company is by proper proceedings to restrain the second from getting into operation, and not by neglecting its own duties.¹⁶ And an injunction against the abuse of corporate privileges will not be denied because the wrongful acts constitute crimes.¹⁷ But where the primary object of the institution of a corporation is the public welfare, and the interest of the stockholders is only secondary, the willful frustration of that intention by the company's acts constitute a fraud upon the public; so that a corporation guilty of such a fraud cannot have the aid of a court of equity to suppress, for its own benefit, an interference with exclusive privileges, claimed under its charter,

¹³ *Crawshay v. Soutter*, 6 Wall. (73 U. S.) 739, 18 L. ed. 845.

¹⁴ *Star Co. v. Colver Pub. House* (U. S. C. C.), 141 Fed. 129.

¹⁵ *Colorado Eastern Rd. Co. v. Chicago, Burlington & Quincy Ry. Co.* (U. S. C. C. A.), 141 Fed. 898, 73 C. C. A. 132. See *Denver & Rio Grande Rd. Co. v. United States* (U. S. C. C. A.), 124 Fed. 156, 59 C. C. A. 579.

¹⁶ *Turnpike Co. v. State*, 3 Wall. (70 U. S.) 210, 18 L. ed. 180.

¹⁷ *Columbian Athletic Club v. State ex rel. McMahan*, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914.

by a competition which has arisen from its own neglect of a charter duty.¹⁸ Where a bill in equity was brought by an exchange to enjoin defendant from receiving quotations from the telegraph company, to which it had given the right to distribute them, and from using the same, an injunction was issued, based upon the ground, principally, that quotations of prices on an exchange, collected by the exchange, are property and entitled to the protection of the law, and the exchange has the right to keep them to itself or have them distributed under conditions established by it.¹⁹ So where a town has no right to exercise a ferry privilege, it is correctly restrained by injunction from doing so by the State Court.²⁰ But an injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or goods in the ordinary prosecution of commerce without the regularity or purpose of ferry trips; that remedy applies only to one which is run openly and avowedly as a ferryboat.²¹

In another case the complainant, a corporation engaged in the transportation of passengers and freight, brought a petition against a like corporation, its officers and agents, to obtain an injunction restraining said defendant from using certain wharves of some of which the complainant was the owner in fee, and of others the lessee of the exclusive use from the owners. The complainant claimed the exclusive right to the use of said wharves, either as owner or lessee, and that the defendant illegally and against the complainant's will insisted upon using them to carry on its business, although offering to pay the complainant what was the reasonable value of the defendant's use of such wharves. In determining that a decree for an injunction should be entered the court held: (1) that a wharf on a

¹⁸ *Scranton Electric Light & Heat Co.'s Appeal*, 122 Pa. St. 154, 9 Am. St. Rep. 79.

¹⁹ *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. 529; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 40 L. ed. 1031, 25 Sup. Ct. 637.

²⁰ *East Hartford v. Hartford Bridge Co.*, 10 How. (51 U. S.) 511, 13 L. ed. 518.

²¹ *Conway v. Taylor*, 1 Black (66 U. S.), 603, 17 L. ed. 191.

navigable stream is private property and subject to the absolute control of the owner as other property is; (2) the rights of a riparian owner on a navigable stream are governed by the law of the State in which the stream is situated, but subject to the paramount public right of navigation; (3) one of the rights of a riparian proprietor is to build private wharves out so as to reach the navigable waters of the stream, and this right has been affirmed by the courts of Virginia; but a wharf obstructing navigation or private rights of others, or encroaching upon any public landing may be abated; (4) a private wharf on a navigable stream is the exclusive property of the owner of which he can only be deprived in accordance with established law, and, if taken for public use, on compensation being made; (5) a private wharf on a navigable stream is not held by the owner, as a railroad is, subject to the public use, and a third person has no right to demand its use even on tendering compensation therefor and even though there may be no other wharf at the place; (6) the public obtains no adverse right against the owner of a private wharf by mere user; in the absence of an intent on the owner's part to dedicate, and an acceptance by the public authority, the use is mere license subject to withdrawal.²² The remarks of Mr. Justice Bradley in *Transportation Company v. Parkersburg*, as to the right of the owner of a private wharf to make arbitrary charges, were declared *obiter* and not applicable to this case.²³

In the matter of taxation a State assessment upon an express company of another State proportioned to mileage is bad when it appears that the total valuation is made up principally from real and personal property, not necessarily used in the actual business of the company, and which is permanently located in the State where the company is incorporated; and the transmission of such an assessment by a State board to the

²² *Weems Steamboat Co. v. People's Co.*, 214 U. S. 345, 29 Sup. Ct. 661, 53 L. ed. 1024, judgment of Circuit Court of Appeals, affirming it, reversed 141 Fed. 454; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, distinguished; *Louisville & Nashville Ry. Co. v. West Coast Naval Stores*, 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. 745.

²³ 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. 732.

auditors of the several counties may be enjoined.²⁴ In the case of title and the rights of purchasers of public lands, a party who, on complying with the provisions of an act of Congress, would have the right to purchase lands, part of the public domain, but who has not complied with the requirements of the act, is not entitled, upon the mere showing of such right to purchase, to demand that its title be adjudged good and valid, and that another party who is in possession be adjudged to have no estate or interest in the land, or that such other person be enjoined from asserting any adverse claim, or that the claimant recover the possession of the land with the right of ousting the defendant from the improvements made thereon by its predecessors.²⁵ Where a party applying for an injunction had a right to have been made a party in the State Court, a Federal Court will not continue an order restraining the exercise of a right in condemnation proceedings, acquired under a statute and in which a State Court had entered a decree and had competent jurisdiction so to do.²⁶ Where an action at law has been brought by a receiver of an insolvent national bank against a party, the Circuit Court will take jurisdiction of a suit in equity to restrain the prosecution of said action at law since the equity suit is ancillary to the action at law.²⁷ An injunction granted by the final decree should not be broader than the necessities of the case require and if broader than that it will be modified by the Federal Supreme Court.²⁸

§ 422. Injunction—Jurisdiction.

Whenever a remedy at law is doubtful and difficult, a Court of Chancery has jurisdiction.²⁹

²⁴ *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761.

²⁵ *San Jose Land & Water Co. v. San Jose Ranch Co.*, 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. 487.

²⁶ *Union Pacific Rd. Co. v. Denver & Rio Grande Rd. Co.* (U. S. C. C.), 37 Fed. 179.

²⁷ *Aldrich v. Campbell* (U. S. C. C. A.), 97 Fed. 663, 38 C. C. A. 347.

²⁸ *McNeill v. Southern Railway Co.*, 202 U. S. 543, 50 L. ed. 1143, 26 Sup. Ct. 722.

²⁹ *American Ins. Co. v. Fisk*, 1 Paige Ch. (N. Y.) 90.

Adequate remedy at law, see §§ 163-165, 406-408, herein.

The United States Circuit Court has no jurisdiction of a suit for an injunction wherein one railroad company seeks to prevent the construction of a railroad where the subject of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo*, and where the rights of a corporation not made parties to the suit are seriously involved in the controversy in a case to which the act of Congress, providing for the nonjoinder of parties who were not inhabitants of the district, does not apply.³⁰

So the New York Supreme Court has no jurisdiction to entertain a suit in equity brought by a stockholder of a corporation in his own behalf and that of all other stockholders to determine the respective rights of the office of director as between rival claimants not parties to the action. Nor can it enjoin a *de facto* director, holding under color of an election, from exercising the functions of the office. Hence, a complaint in such action which in substance alleges a conspiracy to obtain control of the corporation by the election of directors who are "dummies," having no actual ownership of the stock standing in their names, the acceptance of said directors of the resignation of a duly elected director after he had withdrawn the same, and a refusal to recognize him as director, does not state a cause of action, nor authorize the court to enjoin a *de facto* director from acting, nor to compel the recognition of the rival claimant.³¹ Although a bill by a stockholder in a Federal Court against the corporation and another corporation of the same State alleged facts which, if true, gave the court jurisdiction on the ground of diversity of citizenship, where the bill was not verified, and such allegations were promptly denied by the first corporation, which denied that complainant was a *bona fide* stockholder, and alleged that the suit was brought collusively in the interest of its codefendant to enable the latter to litigate matters between the two corporations in the Federal Court, which allega-

³⁰ Northern Indiana Rd. Co. v. Michigan Central Rd. Co., 15 How. (56 U. S.) 233, 14 L. ed. 674.

³¹ Moir v. Provident Savings Life Assur. Soc., 112 N. Y. Supp. 57, 127 App. Div. 591.

tions found support in the averment of the bill of facts not germane to the cause of action stated, the joinder of unnecessary parties, and the filing of a cross bill by the other corporation against the first defendant, a jurisdictional issue was presented, which the court was required to determine before granting an injunction on the cross bill restraining further proceedings in a pending suit in a State Court.³²

§ 423. Jurisdiction to Enjoin Prosecuting Action in Another State—Jurisdiction of Federal Court—Injunction from to State Court.

A court of equity has jurisdiction and power to enjoin parties from prosecuting an action in another State concerning the same subject-matter. Thus, where an action was brought in New York State to recover the amount due under a life insurance policy, and the insurance company thereafter, when said case was about to be reached for trial, brought a suit in equity in a Massachusetts court praying that the policy be decreed void and surrendered, and an independent suit was brought in New York by the plaintiff in the first action to restrain the prosecution of the equity suit in Massachusetts, the New York court granted an order enjoining the same where the plaintiff subsequently became and at the time of suing was a citizen of New York and the insurer was engaged in business in that State even though the contract of insurance was made in Massachusetts between citizens then of Massachusetts.³³

³² Syllabus in *National Hollow Brake B. Co. v. Chicago Ry. Equip. Co.*, 168 Fed. 666.

³³ *Webster v. Columbian National Life Ins. Co.*, 116 N. Y. Supp. 404, aff'g 115 N. Y. Supp. 892 (two of the five judges dissenting). The decision in this case in the appellate division of the Supreme Court was as follows: If a foreign corporation is engaged in business in New York by permission of the Insurance Department, it is a citizen of that State so far as any litigation is concerned. Residence is largely a matter of intention, and where plaintiff shows that her husband resided in New York at the time of his death, and that she leased and moved into an apartment in the city of New York and declared her intention of permanently residing there before she brought her action, and satisfactorily explains why she gave her residence as Massachusetts in making proofs of death, the fact of her residence in New York State is established. And where an action on an insurance

A Federal Circuit Court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a State or of a national court for new causes, such as fraud, accident or mistake, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which such judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree.³⁴ But an injunction will not be granted by a Federal Circuit Court where an adequate remedy can be had in the State Court in like cases as where it is sought to restrain the use of force to gain the use of premises.³⁵ And a Federal Court will not by reason of the prohibition in the United States statutes,³⁶ restrain the petitioner in condemnation proceedings pending in a State Court, from entering upon the lands in question.³⁷ Nor can a Federal Court restrain a State Court from acting in any case brought before it either of a civil or criminal nature, or prevent any investigation or action of a grand jury.³⁸ Nor by reason of the prohibition of said statute will a Circuit Court, at the instance of a mortgagee of a railroad company, restrain the enforcement of the judgment of a State Court for the ejectment of a railroad

policy is brought by a resident of said State in the Supreme Court against a Massachusetts corporation doing business in New York, the court has power to enjoin the defendant from prosecuting a suit in Massachusetts to cancel the policy on the same grounds which it pleads as a defense to the action brought in this State, therefore, the proper practice in such a case is to bring an independent action to restrain the defendant, instead of moving in the action already brought. A contract of insurance is transitory in its nature, and upon the death of the insured the beneficiary can bring an action thereon in any State where the defendant is doing business and where process can be served upon it, and of which she is a resident. *Webster v. Columbian National Life Ins. Co.*, 131 App. Div. 837.

³⁴ *National Surety Co. v. State Bank* (U. S. C. C. A.), 120 Fed. 593.

³⁵ *Latham v. Northern Pacific Ry. Co.* (U. S. C. C.), 45 Fed. 721.

³⁶ U. S. Rev. Stat., § 720.

³⁷ *Dillon v. Kansas City S. B. Rd. Co.* (U. S. C. C.), 43 Fed. 109.

³⁸ *Young, Ex parte*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 44; see § 430, herein.

company from certain land.³⁹ But where a Federal Court has acquired jurisdiction for purposes other than that of the injunction to restrain proceedings in a State Court the above statute does not apply to proceedings which are merely incidental to said jurisdiction.⁴⁰

§ 424. Injunction Against Officers, Directors or Stockholders.

Although we have considered fully the rights, liabilities and remedies of officers, directors and stockholders ⁴¹ we will briefly state here that while the courts will not interfere with the internal affairs of a corporation ⁴² the equity powers of the court may be invoked to restrain the directors or officers from abusing their powers.⁴³ So a stockholder in a corporation has a remedy in chancery against the directors, to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital or profits which might lessen the value of the shares, if the acts intended to be done amount to what is called in law a breach of trust or duty. So also a stockholder has a remedy against individuals, in whatever character they profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. Therefore, when the directors of a bank refused to take the proper measure to resist the collection of a tax, which they themselves believed to have been imposed upon them in violation of their charter, this refusal amounted to what is termed in law a breach of trust, a stockholder had a right to file a bill in chancery asking for such a remedy as the case might require. If the stockholder be a resident of another State than that in which the bank and persons attempting to violate its

³⁹ *Central Trust Co. v. Grantham* (U. S. C. C. A.), 83 Fed. 540, 27 C. C. A. 570, 53 U. S. App. 647.

⁴⁰ *Garner v. Second Nat. Bank* (U. S. C. C. A.), 67 Fed. 833.

⁴¹ See §§ 261 *et seq.*, herein.

⁴² See § 260, herein.

⁴³ *Lawrence v. Weber*, 65 Misc. (N. Y.) 603.

charter, or commit a breach of trust or duty have their domicile, he may file his bill in the courts of the United States. He has this right under the Constitution and laws of the United States.⁴⁴ And stockholders and creditors may be enjoined by a Federal Circuit Court from proceeding to have declared void a mortgage which has been foreclosed by decree in said Circuit Court.⁴⁵

§ 425. Injunction—Rate Regulation.⁴⁶

In a proceeding brought by the attorney-general of a State charging the defendant railway company with a continuous violation of a State law fixing rates for the carriage of coal within the State and asking for an injunction, it was held that where the State Court has found the rate fixed by a State commission on a single commodity to be not confiscatory and has granted an injunction, the decree will be affirmed without prejudice to the right of the carrier to reopen the case if, after adequate trial of the rate, it can prove that it is actually confiscatory and amounts to a deprivation of property without due process of law.⁴⁷

In view of the continuous confusion, risks and multiplicity of suits, which would result from, and the public interests and vast number of people which would be affected by, the enforcement of an ordinance reducing the rates of fare of street railways, which ordinance the company claim is unconstitutional as impairing the obligation of the contracts resulting from the ordinances granting the franchise, a court of equity has jurisdiction of an action to enjoin the enforcement of the ordinance, especially when the ordinance affects only a part of the system and would engender the enforcement of two rates of fare over the same line, leading to dangerous consequences.⁴⁸

⁴⁴ *Dodge v. Woolsey*, 18 How. (59 U. S.) 331, 15 L. ed. 401.

⁴⁵ *Central Trust Co. v. Western N. C. R. Co.* (U. S. C. C.), 89 Fed. 24.

⁴⁶ See §§ 32-41, 95, 106, 113-115, 132, 133, 143-153, herein.

⁴⁷ *Northern Pacific Ry. Co. v. North Dakota*, 216 U. S. 579, 30 Sup. Ct. —, 54 L. ed. —, aff'g without prejudice 17 No. Dak. 223, following *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 392, 53 L. ed. 382.

⁴⁸ *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. 756.

§ 426. Injunction—By and Against Railroads and Street Railroads.

A railroad company has a right to maintain a bill for an injunction to restrain the enforcement of a city ordinance which interferes with the construction or maintenance of depot buildings which it is required by law to maintain.⁴⁹

An actionable wrong is committed by one who maliciously interferes in a contract between two parties and induces one of them, to break that contract to the injury of the other,⁵⁰ and this principle applies to carrying on the business of purchasing and selling nontransferable reduced rate railroad tickets for profit to the injury of the railroad company issuing them, and this even though the ingredient of actual malice, in the sense of personal ill-will, does not exist. And when the dealings of a class of speculators in nontransferable tickets have assumed great magnitude, involving large cost and risk to the railroad company in preventing the wrongful use of such tickets, and the parties so dealing in them have expressly declared their intention of continuing so to do, a court of equity has power to grant relief by injunction. Again, every injunction contemplates the enforcement, as against the party enjoined, of a rule of comfort for the future as to the wrongs to which the injunction relates, and a court of equity may extend an injunction so as to restrain the defendants from dealing not only in nontransferable tickets already issued by complainant, but also in all tickets of a similar nature which shall be issued in the future; and the issuing of such an injunction does not amount to an exercise of legislative, as distinct from judicial, power and a denial of due process of law.⁵¹ Where the faulty construction of an electric street railway system and the negligent operation thereof result in the continual damage to the water pipes of a city for which there exists no adequate remedy at law, the

⁴⁹ *Montgomery v. Louisville & Nashville Ry. Co.*, 84 Ala. 127, 4 So. 626.

⁵⁰ *Bitterman v. Louisville & Nashville Rd. Co.*, 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. 91; *Angle v. Chicago & St. Paul Ry. Co.*, 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. 240.

⁵¹ *Bitterman v. Louisville & Nashville Ry. Co.*, 207 U. S. 205, 206, 52 L. ed. 171, 28 Sup. Ct. 91, *aff'g* 44 Fed. 34.

municipality has a remedy by injunction to restrain such operation of the road; but the company which is operating under a city franchise is liable only for damages resulting from actual negligence in using such system, as the city must be held to have contemplated any mischief arising from the reasonable use of such a system.⁵²

When the certificate of incorporation of a railway company states that the purpose of the corporation is to construct and operate a railroad, designating certain points as termini of the proposed road, and that it is to run through the city of F., and said company lawfully acquired a franchise to construct and operate a street railway in said city, and, in pursuance of the ordinance, granting the franchise, is proceeding to build its track in one of the streets of said city, the owner of real estate adjoining said street cannot enjoin the company from so doing, whether the charter of the company authorizes it to construct and operate a street railway or not, unless, upon the ordinary principles of equity jurisprudence, he has grounds for equitable relief against the company. If it be true that the corporation is exceeding its corporate powers, that fact is not alone sufficient ground for equitable interference at the suit of a person who is not a member of the company. Such adjoining lot owner cannot restrain the construction of the railway in the street upon which his property abuts until the damage to his property, resulting from such use of the street, is ascertained and paid or secured, unless the injury to his property is so great as to destroy its value and therefore amounts to a virtual taking of the property for the use of the railway company. And this applies where a State Constitution provides that compensation shall be paid to the owner of the property for such damages and gives him an action at law therefor, but does not, as in cases where the property is actually taken, require the compensation to be paid or secured before the injury is inflicted; and, having an adequate remedy at law for the injury, the owner of such lot can have no relief in a court of equity on account thereof, if the legislature

⁵² *Dayton v. City Ry. Co.*, 26 Ohio Cir. Ct. Rep. (Laning) 736.

has authorized the construction and operation of the railway in such street.⁵³ The intersection of railroad tracks, where the same cross a public highway, by electric street railway tracks, does not entitle the railroad company to an injunction, in the absence of some peculiar or special damage to its property.⁵⁴

§ 427. Injunction—By and Against Telegraph and Telephone Companies.⁵⁵

Even though a tax statute may be valid and collectible, yet, where a telegraph or telephone line is an instrument or agency of interstate commerce, an injunction cannot be granted by a State Court to restrain such companies from doing business in the State, for a failure to pay State taxes, as it would clearly impede and obstruct interstate commerce were such remedy granted, and it would be repugnant to the Post Roads Act.⁵⁶ It is held, however, that a constitutional provision requiring as a condition precedent to doing business in the State, that a foreign corporation shall have a known place of business and an authorized agent therein does not violate the Federal Constitution, and that a domestic telegraph company will not be enjoined from impeding and instructing a foreign telegraph company from constructing and operating its lines within the State, where the complaint does not show a compliance with said condition precedent. It is also held, however, in the same case that a State cannot exclude such foreign corporations.⁵⁷

⁵³ *Watson v. Fairmont & Suburban Ry. Co.*, 49 W. Va. 528, 39 S. E. 193.

Abutting owners' rights and remedies; telegraph, telephone and street railway or other companies using electricity; additional burden, see Joyce on Electric Law (2d ed.), §§ 295-348.

⁵⁴ *New York, New Haven & Hfd. Rd. Co. v. Fair Haven & W. R. Co.*, 70 Conn. 610, 40 Atl. 607, 41 Atl. 169; *New York, New Haven & Hfd. Rd. Co. v. Bridgeport Tract. Co.*, 65 Conn. 410, 32 Atl. 953; *Chicago & Calumet T. R. Co. v. Whiting, Hammond & E. C. S. R. Co.*, 139 Ind. 297, 38 N. E. 604.

⁵⁵ See § 428, herein.

⁵⁶ *Pennsylvania Telephone Co., Matter of Taxation of*, 48 N. J. Eq. 91, 27 Am. St. Rep. 462. See *Western Union Teleg. Co. v. Attorney-General of Massachusetts*, 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. 961.

⁵⁷ *American Union Teleg. Co. v. Western Union Teleg. Co.*, 67 Ala. 26, 42 Am. St. Rep. 90. See as to this last point, viz.: that a State cannot exclude

And where a telegraph company instituted proceedings to condemn and appropriate the right of way over a bridge for the purpose of attaching its wires thereto and had not complied with the provisions of the Post Roads Act requiring as a condition precedent to the exercise of its rights by a telegraph company that it must file with the postmaster-general its written acceptance of the restrictions and obligations imposed by such act, the court held that compliance with this provision was necessary, and that as it had not complied therewith all proceedings were invalid, and that an injunction would be continued, prohibiting the company from proceeding any further, until it had filed its acceptance as required by such statute.⁵⁸ An injunction has also been granted to restrain a telephone company from constructing its line without first complying with the requirements of a statute.⁵⁹ In another case where an abutting owner sought to restrain the stringing of wires in front of his premises, and there did not appear to be any default on the part of the company as to compliance with a statute in reference to the incorporation of telegraph companies, a preliminary injunction was refused on the ground that there must be urgent necessity, and the damage threatened must be of an irreparable character to warrant the court in ordering it.⁶⁰

If a telegraph company has no authority to construct its line along a railroad right of way it may be enjoined from so doing in an action by the railroad company.⁶¹ The mere fact, however, that a railroad company has granted to a telegraph company the right to construct its line along the railroad right of way, will not be a sufficient ground for granting an injunction, in

such corporations when they claim the benefit of the Post Roads Act and have complied with its provisions, *Joyce on Electric Law* (2d ed.), § 65.

⁵⁸ *Chicago & Atchison Bridge Co. v. Pacific Mut. Teleg. Co.*, 36 Kan. 113, 12 Pac. 535.

⁵⁹ *Broome v. New York & New Jersey Telephone Co.*, 42 N. J. Eq. 141, 7 Atl. 851.

⁶⁰ *Roake v. American Telep. & Teleg. Co.*, 41 N. J. Eq. 35, 2 Atl. 618.

Abutting owners' rights and remedies, see *Joyce on Electric Law* (2d ed.), §§ 295-348.

⁶¹ *New York City & Northern Ry. Co. v. Central Union Teleg. Co.*, 21 Hun (N. Y.), 261, 1 Am. Elect. Cas. 315.

behalf of such company, restraining another telegraph company from constructing a line of telegraph along the same right of way.⁶² But it has been held that a telegraph company which has erected poles in pursuance to such a contract has an exclusive right to the use of the poles erected by it, and that another company may be enjoined from using the same poles for its lines of wires.⁶³

§ 428. Injunction—Interference With Departmental Officers or Executive Department—Postmaster.⁶⁴

The general rule is that the judicial power will not interpose, by mandamus or injunction, to limit or direct the action of departmental officers in respect of matters pending, within their jurisdiction and control.⁶⁵ And even if the power to review the determination of an executive department exists, where the complainant is merely appealing from the discretion of the department to the discretion of the court, the court should not interfere by injunction where the complainant has no clear legal right to the relief sought.⁶⁶

⁶² *Pacific Postal Telegr. Cable Co. v. Western Union Telegr. Co.*, 50 Fed. 493, 4 Am. Elec. Cas. 232; *Western Union Telegr. Co. v. Baltimore & Ohio Telegr. Co.*, 23 Fed. 12; *Western Union Telegr. Co. v. Baltimore & Ohio Telegr. Co.*, 22 Fed. 133; *Western Union Telegr. Co. v. American Union Telegr. Co.*, 9 Biss. (U. S. C. C.) 72, 1 Amer. Elec. Cas. 288; *Western Union Telegr. Co. v. American Union Telegr. Co.*, 65 Ga. 160. Examine *Western Union Telegr. Co. v. New Brunswick Ry. Co.*, N. B. Eq. Cas. 338.

⁶³ *Western Union Telegr. v. Paducah R. Co.*, 86 Ill. 246.

⁶⁴ See § 129, herein.

⁶⁵ *New Orleans v. Paine*, 147 U. S. 261, 37 L. ed. 162, 13 Sup. Ct. 303 (land department officers).

⁶⁶ *National Life Ins. Co. v. National Life Ins. Co.*, 209 U. S. 317, 52 L. ed. 808, 28 Sup. Ct. 541. This was a bill in equity to obtain an injunction against corporation defendant, restraining it and its manager from receiving, and the postmaster and the letter carriers named as defendants from delivering mail matter to the defendant on the ground that such mail matter was intended for the complainant even though not addressed to it, and it was held that where a corporation has taken the same name as that of an older corporation the fact that it has a greater quantity of mail matter does not justify the court in interfering with a special order of the Post Office Department directing the delivery of matter not addressed by street and number in accordance with Par. 4 of § 645 of the General Regulations of 1902, to the one first adopting the name in the place of address.

Where a temporary injunction has been granted, but before final hearing the cause for which it was granted has been removed, it will not be continued or made perpetual. Thus a bill to enjoin a postmaster from refusing to admit a magazine published by complainant to the mails at second-class rates, in consequence of the alleged illegal action of the Post Office Department in revoking the privilege previously granted to said magazine, and to determine the number of copies complainant is entitled to send at such rates, will not be entertained where, pending the suit, the department has granted a new permit, although it limits the number of copies to a smaller number than the bill alleges that complainant is entitled to send when it was filed, since such action leaves no ground for the granting of relief within the allegations of the bill or within the jurisdiction of a court of equity.⁶⁷

§ 429. Injunction to Protect Franchises of Corporation or to Prevent Their Forfeiture.

An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges. "The distinction between destroying what is denominated the corporate franchise of a bank, and destroying its vivifying principle, the right to deal in money, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death and a right to sentence him to a total privation of sustenance during life."⁶⁸ So equity will interfere by injunction to prevent a city's unlawful attempt to destroy by ordinance a railroad company's franchise, and it constitutes no ground for a refusal to so interfere that the ordinance is quasi criminal in character or that acts constituting personal trespasses accompany the attempted destruction of said franchise.⁶⁹ A Circuit Court of the United States

⁶⁷ Syllabus in *Lewis Pub. Co. v. Wyman*, 168 Fed. 756.

⁶⁸ *Osborn v. United States Bank*, 9 Wheat. (22 U. S.) 738, 862, 6 L. ed. 204; quotation is from Mr. Chief Justice Marshall. See § 257, herein.

⁶⁹ *Port of Mobile v. Louisville & Nashville Rd. Co.*, 84 Ala. 116, 4 So. 106, 5 Am. St. Rep. 342.

may also restrain the enforcement of a city ordinance under which it is sought to forfeit a railroad company's right in the streets where, upon the allegations of the complaint, the breach of condition upon which the forfeiture was sought is denied.⁷⁰ Again, where a street railway corporation has expended large sums of money and exercised due diligence in building and operating its road, so as to comply with an ordinance of permission, but unforeseen circumstances have caused a delay, which has occasioned no pecuniary injury to the township or its inhabitants, equity will interfere to restrain the adoption of an ordinance by the township declaring a forfeiture of the franchise of the corporation because it did not comply with the statute of permission, which provided that cars should be running at a certain headway, on a continuous line of double track, within a specified time.⁷¹

Where a suit was brought in pursuance of a statute to enjoin the maintenance of toll gates upon a road alleged to be a public highway it was held that where the charter of the toll road provided that the privileges granted should continue fifty years subject to the right of the county to acquire it after twenty years, all privileges ceased on the expiration of the fifty years; and the owner of the franchise was not deprived of his property without due process of law, also that the contract in the charter was not impaired, by the injunction, from further maintaining toll gates on such road.⁷²

§ 430. Injunction—Criminal Proceedings—When Equity Cannot and Can Enjoin.

A court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the right of property

⁷⁰ *Iron Mountain Ry. Co. v. Memphis* (U. S. C. C. A.), 96 Fed. 113, 37 C. C. A. 410.

⁷¹ *North Jersey Ry. Co. v. South Orange*, 58 N. J. Eq. 83, 43 Atl. 53.

⁷² *Scott County Macadamized Road Co. v. Hines*, 215 U. S. 336, 54 L. ed. —, 30 Sup. Ct. —, aff'g 207 Mo. 54.

or the enforcement of an unconstitutional law.⁷³ But where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.⁷⁴ Again, while a Federal Court cannot interfere in a criminal case already pending in a State Court, and while, as a general rule, a court of equity cannot enjoin criminal proceedings, these rules do not apply when such proceedings are brought to enforce an alleged unconstitutional State statute, after the unconstitutionality thereof has become the subject of inquiry in a suit pending in a Federal Court which has first obtained jurisdiction thereover; and under such circumstances the Federal Court has the right in both civil and criminal cases to hold and maintain such jurisdiction to the exclusion of all other courts.⁷⁵ So where a bill was brought against a number of district attorneys to enjoin them from instituting actions against a telegraph company to recover certain penalties provided for by a State statute for nonconformity with conditions precedent to doing business in the State, imposed upon foreign corporations, it was held that, individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action; and such an action is not prohibited by the Eleventh Amendment of the Constitution of the United States.⁷⁶

§ 431. Injunction—Nuisances—Bill in Equity to Abate.

Where one has a grant of a ferry, bridge or road, with the

⁷³ *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. 498; *Sawyer, In re*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. —.

⁷⁴ *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. 18.

⁷⁵ *Young, Ex parte*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 44.

⁷⁶ *Western Union Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. ed. —, 30 Sup. Ct. —, following *Young, Ex parte*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. 441. See § 155, herein; see *Ludwig v. Western Union Teleg. Co.*, 216 U. S. 146, 54 L. ed. —, 30 Sup. Ct. —.

exclusive right of taking toll, the erection of another ferry, bridge, or road, so near it as to create a competition injurious to such franchise, is, in respect to such franchise, a nuisance; and the court will grant a perpetual injunction to secure the enjoyment of the statute franchise, and prevent the use of the rival establishment.⁷⁷ In a suit for the abatement of a nuisance, a court of equity confining its inquiries within the limits of its local jurisdiction, must be governed by the same rules which a court of law would act upon in trying an indictment for the same nuisance, and the rule of law is that where a bridge over a navigable stream is erected for public purposes, and produces a public benefit, and leaves a reasonable space for the passage of vessels, it is not indictable. Another rule of law is that the bridge must appear plainly to be a nuisance before it can be so decreed; since a court of equity proceeding by bill, like a criminal court trying an indictment, must give the benefit of all reasonable doubts to the defendant.⁷⁸

§ 432. Injunction — Nuisances — Parties — State or Attorney-General—Corporations—Joinder.

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They retained the right to make reasonable demands on the grounds of their still remaining quasi sovereign interests, and the alternative to force a suit in the Federal Supreme Court. So that court has jurisdiction to, and at the suit of a State will, enjoin a corporation, citizen of another State, from discharging over its territory noxious fumes from works in another State where it appears that those fumes cause and threaten damage on a considerable scale to the forests and vegetable life, if not to health, within the plaintiff's State. A suit brought by a State to enjoin a corporation having its works in another State from discharging noxious gases over its territory is not, however, the same as one

⁷⁷ *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101, 9 Am. Dec. 274.

⁷⁸ *Mississippi & Missouri Rd. Co. v. Ward*, 2 Black (67 U. S.), 485, 17 L. ed. 311.

between private parties, and although the elements which would form the basis of relief between private parties are wanting, the State can maintain the suit for injury in a capacity as quasi sovereign, in which capacity it has an interest independent of and behind its citizens in all the earth and air within its domain; and whether insisting upon bringing such a suit results in more harm than good to its citizens, many of whom may profit through the maintenance of the works causing the nuisance, is for the State itself to determine.⁷⁹

In an Oklahoma case the county attorney, acting under the provisions of a statute providing that an injunction could be granted to enjoin and suppress the keeping of a common nuisance, began certain suits of the character stated below, securing injunctive relief without bond, upon a petition verified upon information and belief. The position taken by him was that a monopoly or combination in restraint of trade was a public or common nuisance, and as such that courts of equity at the instance of the public prosecutor had the power to suppress the same. So where it was alleged that certain parties in violation of such act of the territorial legislature had entered into and become members of a pool, trust, agreement, combination and understanding with each other to create a monopoly in the business of buying and selling lumber, coal and grain, and that, acting thereunder, they were enabled to and were charging the public unjust, unreasonable and exorbitant prices for such commodities, and preventing others from engaging in such business, such acts constitute a public, common nuisance, and the parties thereto may be restrained as provided for by statute⁸⁰ at the suit of the county attorney.⁸¹ But a railroad cor-

⁷⁹ *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. 618.

⁸⁰ *Wilson's Rev. & Am. St. Okla.*, 1903, § 4440.

⁸¹ *Territory v. Long Bell Lumber Co.*, 22 Okla. 890, 99 Pac. 911. The court, per Dunn, J., said: "It will be noted that the petitions allege that the defendants have become members of a pool, trust, agreement, combination, and understanding with each other to regulate and fix the price of lumber, coal and grain and to prevent and restrict competition in the sale thereof, and that by virtue of being thus federated together, have so controlled all the business of buying and selling such commodities in the town of King-

poration cannot by the general principles of equity jurisprudence, maintain a suit for an injunction, as for a nuisance, against the keepers of saloons near the line of its road, at which workmen buy intoxicating liquors and get so drunk as

fisher as to create a monopoly for their benefit and, by charging unjust, unreasonable, exorbitant prices for these commodities, their acts have been and are greatly to the injury of the people of the county of Kingfisher and the territory of Oklahoma; that, by means of said confederation, combination and monopoly, they are enabled to and do keep other persons desiring to enter said business from doing so, and arbitrarily fix the price which shall be paid for such commodities, and also the price at which they shall be sold to consumers, and that they have thereby completely excluded competition in these lines. * * * Forestalling and engrossing in the purchase of commodities in common use were at an early date condemned by the English Parliament, being made punishable by fine and imprisonment, and courts have uniformly denied to parties to contracts in restraint of trade their remedies and relief. Nearly all of the States of the Union, as well as the Federal Government, have provisions either in their constitutions or statutes making them illegal and bringing them under the ban of prosecution on the part of the State. Where corporations are shown to have been involved, they have been proceeded against by *quo warranto*, *People v. North River Sugar Refining Co.*, 22 Abb. N. C. 164, 3 N. Y. Supp. 401; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.*, 153 Md. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314; *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. ed. 689, or they have been prosecuted under the criminal provisions of the statute, *Smiley v. Kansas*, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. ed. 546, or the State has proceeded against them by injunction to prevent a continuation of their illegal practices, *Gulf, Colorado & Santa Fe Ry. Co. et al. v. State of Texas*, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815, or the parties thereto have been indicted and prosecuted for conspiracy, *People v. Sheldon et al.*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690; *People v. Duke*, 19 Misc. Rep. 292, 44 N. Y. Supp. 336; *State ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; *State v. Eastern Coal Co. et al. (R. I.)*, 70 Atl. 1. The State of Connecticut proceeded by *mandamus* in one instance against a railroad company compelling it to reinstate train service which it had ceased under contract made with a competing carrier. *State v. Hartford & New Haven Ry. Co.*, 29 Conn. 538. The foregoing cases exemplify some of the different remedies which have heretofore been applied to relieve the public of the effect of unlawful combinations restrictive of free competition, and now we are called on to say whether or not combinations such as are delineated in the petitions herein may be proceeded against in yet an additional way, as for a nuisance; the question being: Do their acts produce such a condition as to bring them within the terms of our statute, to the end that their con-

to be unfit for work.⁸² Where a nuisance has been erected, and is maintained by several persons or corporations, those who are not within the jurisdiction of the court need not be joined as parties defendants in a bill in equity to abate such nuisance.⁸³

§ 433. Injunction to Restrain Enforcement of Orders of Interstate Commerce Commission.⁸⁴

In an action in the Federal Supreme Court a bill was brought to restrain the enforcement of an order of the Interstate Commerce Commission. A preliminary injunction was granted on the ground that the commission had exceeded its powers and the case was taken to the Supreme Court by appeal. The order was made in a proceeding instituted by the commission upon its own motion, and required the establishment of through routes and joint rates, for passengers and their baggage, east and west, from and to certain points on three different railroads. The joint rates were to be the same as certain existing rates between the same points on one of said railroads and its connec-

tinuance may be restrained at the instance of a county attorney on a petition supported by his oath or affirmation, upon information and belief and without a bond? The light in which they are held by the courts is manifest from expressions contained in all of the cases where they have been before them. A few of the list and which might easily be extended are as follows: *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. ed. 585; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *Craft et al. v. McConoughy*, 79 Ill. 346, 22 Am. St. Rep. 171; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. St. Rep. 159; *Charles River Bridge Co. v. Warren Bridge et al.*, 11 Pet. 420, 9 L. ed. 773; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 28 So. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125."

⁸² *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. ed. 686.

⁸³ *Mississippi & Missouri Rd. Co. v. Ward*, 2 Black (67 U. S.), 485, 17 L. ed. 311. The nuisance complained of here was a bridge across the Mississippi River where that river divides the States of Illinois and Iowa, the State line being in the middle of the river, and it was held that as the river was a boundary line between States throughout nearly its whole length, judicial difficulties existed in dealing with nuisances between its shores which could only be removed by legislation; the court also refused to decree a partial removal.

⁸⁴ See §§ 131-137, herein.

tions. The order in question concerned passenger travel in one direction only, and did not affect round trips and did not deal with freight. It was held by the Supreme Court that under the act of Congress⁸⁵ giving the Interstate Commerce Commission power to establish through routes and joint rates where no reasonable or satisfactory through route exists, the existence of such route may be inquired into by the courts, notwithstanding a finding by the commission. It was also held that when one through route exists which is reasonable and satisfactory, the fact that the public would prefer a second which is no shorter or better cannot overcome the natural interpretation of a provision in the statute to the effect that jurisdiction exclusively depends upon the fact that no reasonable or satisfactory route exists. It was further determined that as the Northern Pacific route from the points named to points between Portland and Seattle is reasonable and satisfactory, the fact that there are certain advantages in the Union Pacific or Southern route does not give the Interstate Commerce Commission jurisdiction to establish the latter as a through route against the objection of the Northern Pacific Railway Company.⁸⁶

In another case where a bill in equity was brought to prevent the enforcement of an order made by the Interstate Commerce Commission requiring the plaintiff to establish a switch connection with a branch railroad, a preliminary injunction was issued on the ground that said commission had exceeded its powers, and an appeal was taken directly to the Federal Supreme Court which affirmed said decree, holding that where a statute creates a new right and a commission is given power to extend relief in regard thereto at the instance of a specified class, its power is limited thereto, and that said Interstate Commerce Commission had power to compel such connections with lateral branch roads under the act of Congress,⁸⁷ only at the instance, as stated

⁸⁵ Section 4, act of June 29, 1906, chap. 3591, 34 Stat. 589.

⁸⁶ *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 54 L. ed. —, 30 Sup. Ct. —.

⁸⁷ Section 1 of the act of March 4, 1887, chap. 104, 24 Stat. 379, as amended by § 1 of the act of June 29, 1906, chap. 3591, 34 Stat., 584.

therein, of shippers, and that it had no power to do so on the application of a branch railroad.⁸⁸

§ 434. Bill Lies in Equity to Revise Ruling of Railroad Commissioners.⁸⁹

Where railroad commissioners approve an extension of the location of the tracks of a street railway company it will be assumed that a bill in equity may be maintained to the extent of revising the rulings of such commissioners somewhat as a bill in equity may be maintained to revise the action of the insolvency courts. Where, however, such a bill discloses nothing of which the plaintiffs are entitled to complain, such extension of location approved by said board will not be declared void.⁹⁰

§ 435. Equity—Cancellation and Rescission.

Equity will rescind a contract which has been induced by a false representation concerning a material fact, upon which the party had a right to rely, even though the representing party was ignorant of its truth or falsity.⁹¹ But where the representations made to induce giving a release to a railroad company for personal injuries did not constitute an inducement to execute the release it will not be set aside in equity.⁹² Equity also has jurisdiction to entertain a bill seeking not only a cancellation for fraud of a note and mortgage of a corporation but also of a bill to restrain their collection where such remedy constitutes merely a claim for relief ancillary to that of cancellation.⁹³ Although there may be a cancellation or rescission of a contract in equity, still the power of the court does not authorize it to substitute therefor a new and different contract from that which the parties intended.⁹⁴

⁸⁸ *Interstate Commerce Commission v. Delaware, Lackawanna & Western Ry. Co.*, 216 U. S. 531, 54 L. ed. —, 30 Sup. Ct. —, aff'g 166 Fed. 498.

⁸⁹ See §§ 139 *et seq.*, herein.

⁹⁰ *Daniels v. Commonwealth Ave. St. Ry. Co.*, 175 Mass. 518, 56 N. E. 715.

⁹¹ *Grosh v. Ivanhoe Land & I. Co.*, 95 Va. 161, 27 S. E. 841.

⁹² *Kane v. Chester Traction Co.*, 186 Pa. St. 145, 40 Atl. 320.

⁹³ *Hodson v. Eugene Glass Co.*, 156 Ill. 397, 40 N. E. 971, aff'g 54 Ill. App. 248.

⁹⁴ *Pittsburg & L. A. Iron Co. v. Lake Superior Iron Co.*, 118 Mich. 109, 5 Det. L. N. 457, 76 N. W. 395.

Again, although equity has power to order the delivery up and cancellation of a policy of insurance obtained on fraudulent representations and suppression of facts, yet it will not generally do so, when these representations and suppressions can be perfectly well used as a defense at law in a suit upon the policy. So a bill for such a delivery up and cancellation has been held properly "dismissed without prejudice," even though the evidences of the fraud were considerable, there being no allegation that the holder of the policy meant to assign it; and suit on the policy having, after the bill was filed, been begun at law.⁹⁶ But where a national bank commenced a suit in a Federal Circuit Court to have an assessment of the shares of its capital stock, made by State officers, canceled, declared invalid, or modified, and the defendants demurred upon the ground that the remedy was in equity, it was held that although in the State Courts there existed no distinction between legal and equitable remedies and the proceeding might have been in accordance with the practice in the State Courts, still the plaintiff's remedy must be brought in the form of a suit in equity according to the practice in the Federal Courts and that the demurrer should be sustained.⁹⁶

If there has been no newly discovered evidence, a bill in equity will not lie to cancel a contract or enjoin a judgment thereon, where the complainant, against whom it was rendered, sets up as grounds of relief matters which he had full opportunity to plead in the action at law.⁹⁷ Equity will not at the instance of the seller, rescind a contract of sale of personal property to a corporation upon the ground that at that time the corporation was insolvent unless the officers knew that there was no reasonable probability of meeting the obligation thus incurred when it matured.⁹⁸

⁹⁶ *Insurance Co. v. Bailey*, 13 Wall. (80 U. S.) 616. See also *Security Trust Co. v. Tarpey*, 66 Ill. App. 589; *John Hancock Mut. L. Ins. Co. v. Dick*, 114 Mich. 337, 43 L. R. A. 566, 4 Det. L. N. 607, 72 N. W. 179.

⁹⁷ *Lindey v. First Nat. Bank, Shreveport*, 156 U. S. 485, 39 L. ed. 505, 15 Sup. Ct. 472.

⁹⁸ *Life Insurance Co. v. Bangs*, 103 U. S. 780, 26 L. ed. 608.

⁹⁹ *Edelhoff v. Horner-Miller Straw Goods Mfg. Co.*, 86 Md. 595, 39 Atl. 314.

In a case in the Federal Supreme Court the following facts appeared:

The city of Galesburg, Illinois, by an ordinance, granted to one Shelton, and his assigns, in May, 1883, a franchise for thirty years, to construct and maintain waterworks for supplying the city and its inhabitants with water for public and private uses, the city to pay a specified rent, for five hydrants, and a tariff being fixed for charges for water to consumers. In December, 1883, the waterworks were completed by a water company to which Shelton had assigned the franchise, and a test required by the ordinance was satisfactorily made, and the city, by a resolution, accepted the works. The water furnished by the company for nine months was unfit for domestic purposes. After November, 1884, the supply of water was inadequate for the protection of the city from fire, and its quality was no better than before. During eighteen months after December, 1883, the company had ample time to comply with the contract. The city, by a resolution passed June 1, 1885, repealed the ordinance, and then gave notice to the company that it claimed title to certain old water mains which it had conditionally agreed to sell to Shelton, and of which the company had taken possession. The city then took possession of the old mains, and, in June, 1885, filed a bill in equity against the water company to set aside the contract contained in the ordinance and the agreement for the sale of the old mains. In August, 1883, the company executed a mortgage to a trustee on the franchise and works, to secure sundry bonds which were sold to various purchasers in 1884 and 1885. The interest on them being in default, the trustee foreclosed the mortgage by a suit brought in November, 1885, and the property was bought by a committee of the bondholders, in November, 1886. In February, 1886, the trustee had been made a party to the suit of the city. After their purchase, the members of the committee were also made parties and they filed a cross bill, praying for a decree for the amount due by the city for water rents, and for the restoration to them of the old mains, and for an injunction against the city from interfering with the operation of the works. After issue,

proofs were taken. It was held: that the supply of water was not in compliance with the contract, in quantity or quality; that the taking possession by the city of the old mains was necessary for the protection of the city from fires; that the contract of the city for the sale of the old mains was conditional and was not executed; that the city was not estopped, as against the bondholders, from refusing to pay the rent for the hydrants, which, by the mortgage, was to be applied to pay the interest on the bonds, or from having the contract canceled; that the obligation of Shelton and his assigns was a continuing one, and their right to the continued enjoyment of the consideration for it, was dependent on their continuing to perform it; that the bondholders were bound to take notice of the contents of the ordinance before purchasing their bonds, and purchased and held them subject to the continuing compliance of the company with the terms of the ordinance. In regard to the old mains, the lien of the mortgage was held subject to the conditions of the agreement for the sale of them by the city to Shelton; and a suit by the city for a specific performance of the contract, or one to recover damages for its nonperformance, would be a wholly inadequate remedy in the case; and a decree was held proper annulling the ordinance and the agreement; dismissing the cross bill; directing the city to pay into court, for the use of the cross plaintiffs, three thousand dollars, as the value of the use of the water by the city from December, 1883, to June, 1885; and dividing the costs of the suit equally between the city and the cross plaintiffs.⁹⁰

§ 436. Cancellation, Rescission or Setting Aside Sale of Corporate Stock—Contracts to Prevent Competition—Pretended Purchase of Stock.

If a stock subscription is obtained through fraud, equity may decree a cancellation.¹ Such a suit may be maintained by a

⁹⁰ *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 34 L. ed. 573, 10 Sup. Ct. 316.

¹ *Negley v. Hagerstown Mfg. M. & L. Imp. Co.*, 88 Md. 692, 39 Atl. 506. See also *Ryan v. Seaboard & Rd. Co.* (U. S. C. C.), 89 Fed. 397; *Bosley v. National Machine Co.*, 123 N. Y. 550, 34 N. Y. St. Rep. 277, 25 N. E. 990;

stockholder in his own behalf and in that of others who may join.² Where a bill is brought in a court of equity by minority stockholders to cancel and set aside a sale of corporate stock purchased by a corporation to obtain a controlling interest in another corporation and to thus stifle competition the court will give substantial and permanent relief by requiring the surrender of the stock to the rightful owners upon equitable terms and the court should not limit the relief to be granted to an injunction against said purchaser corporation exercising the rights of a stockholder and from receiving any dividends upon the stock in question. In such a case where the bill prayed also for an injunction and for other relief upon the ground that the pretended purchase, in its necessary operation at the time it was made, tended and tends to materially suppress competition and creates a monopoly in the rendering of telephone service throughout the United States and that it was illegal and void because contrary to the public policy of the State, it was held that a violation of the Antitrust Act of the State³ was not necessary to be proven to maintain the action or defense, and also that it was not necessary that the proof should exclude every reasonable doubt of the averments of the bill to justify a decree in complainant's favor. Such violation, however, was not charged in the pleadings. As a general proposition, all contracts and agreements, of every kind and character, made and entered into by those engaged in an employment or business impressed with a public character, which tend to prevent competition between those engaged in like employment, are opposed to the public policy of the State and are therefore unlawful. All agreements and contracts tending to create mo-

Pennsylvania Co. for Ins. on Lives, etc., v. Franklin F. Ins. Co., 181 Pa. St. 40, 40 Wkly. N. C. 145, 37 L. R. A. 780, 37 Atl. 191.

² Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048, rev'g 66 Ill. App. 427.

³ Sections 1-4 of Antitrust Act of 1891 and §§ 1-6 of the Antitrust Act of 1893, chap. 38, §§ 269a to 269t; Hurd's Rev. Stat. of 1905 (the Law of 1893 was held unconstitutional by the Supreme Court of the United States in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. 431).

nopolies and prevent proper competition are by the common law illegal and void, and a State Constitution which provides that the general assembly shall pass no local or special law for "granting to any corporation, association or individual any special or exclusive privilege or franchise whatever,"⁴ is a clear declaration that the public policy of such State is opposed to all exclusive and monopolistic franchises and powers, of whatsoever kind or character. And this applies to contracts entered into, of the character above stated, whereby one corporation attempts to acquire the control of another corporation, coupled with a pretended purchase of the stock of the latter, and such contracts are mere nullities and the title to such stock never passed from the sellers.⁵

If data upon which representations claimed to have induced the purchase of stock are equally accessible to the purchaser as to the seller and are believed by the latter although not based upon his own knowledge but upon statements made by others the purchaser is not entitled to a rescission of the contract upon the ground of fraud even though such representations concern a contemplated consolidation of corporations and tend to enhance the value of the stock as an investment.⁶ A right to rescind a purchase of stock fraudulently induced by false representations may be waived by acts of the purchaser in continuing, after knowledge of the fraud, to serve as a director and claiming a salary as superintendent, under the contract of sale.⁷

§ 437. Specific Performance.

The specific performance of a conditional contract will not be decreed, unless the condition has been performed.⁸ And a plaintiff will not be required to perform his contract if it is not a condition precedent before he can call on the defendant to

⁴ Section 22, Art. 4, Const. 1870 of Ill.

⁵ *Dunbar v. American Teleph. & Teleg. Co.*, 238 Ill. 456, 486, 487, 87 N. E. 521.

⁶ *Stevenson v. Marble* (U. S. C. C.), 84 Fed. 23.

⁷ *Lear v. S. K. Paige Lumber & M. Co.* (Tenn. Ch. App.), 42 S. W. 808.

⁸ *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

perform his, which alone can secure the plaintiff in the rights he acquired under the contract.⁹ Nor will an illegal contract for the division of profits based upon obtaining a franchise for a certain company by preventing competition with a rival company be specifically enforced.¹⁰ Nor will specific performance be decreed whereby a street railway would be obligated to work its road for all future time, as where it has agreed to run cars over the entire line during the whole of each year;¹¹ nor will specific performance be decreed of a contract made with a railroad company for through transportation of freight at terminal rates where it is too indefinite and uncertain as to said service and the parties, even though based upon the consideration of a free right of way through a city.¹²

If a village corporation has made a contract for the purchase of the plant of a water company, and such contract was *ultra vires* at the time it was made, and afterwards by a legislative act said corporation has been authorized to "vote to purchase the entire works and rights" of the water company "for such sums of money as may be adjudged payable according to the terms" of the contract, such authority may have a retrospective action and make valid the contract, but when the corporation attempts to avail itself of the granted power, it must proceed according to the terms of the act, and first "vote to purchase," etc., "for such sums of money as may be adjudged payable," etc., before it can maintain a bill in equity for the specific performance of the contract.¹³ A contract to convey land for a railroad right of way is not too uncertain and indefinite to be specifically performed where complainant has taken possession with the express assent of defendants and constructed its road thereon and the consideration to be paid can be ascertained by a computation of the acreage used and the amount

⁹ Tidewater Ry. Co. v. Hurt, 109 Va. 204, 63 S. E. 421.

¹⁰ Hyer v. Richmond Traction Co. (U. S. C. C. A.), 80 Fed. 839, 42 U. S. App. 522.

¹¹ Kingston v. Kingston, P. & C. E. R. Co., 28 Ont. Rep. 399.

¹² Clark v. Great Northern R. Co. (U. S. C. C.), 81 Fed. 282.

¹³ Phillips Village Corporation v. Phillips Water Co., 104 Me. 103, 71 Atl. 474.

per acre paid therefor by defendant, including interest and taxes.¹⁴

If a written contract of sale contains within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it and the party who buys, it contains all the requisites of a valid written contract of sale. And a contract between a railroad company and a landowner for the purchase of a right of way, and which, by way of preamble and inducement, recites the purpose of the railroad company to build a road between two designated points, or sections, is not a contract or covenant on the part of the railroad company to build a railroad, but if the land is sufficiently designated and the price fixed, is a valid and enforceable contract for the sale of the land described. And when a statute requires an effort to make such a contract before the company can condemn, it would be a useless ceremony if the contract, when made, could not be enforced.¹⁵ Again, unless equity can decree specific performance of the whole contract, it will not interfere to enforce any part of it, and specific performance will not be enforced unless the remedy is mutual.¹⁶

A court of equity will decree the specific performance of a written contract for the sale of real estate at the instance of a purchaser who has partly performed the contract under circumstances which affect the conscience of the vendor, and where a failure on his part to carry out the contract would operate as a fraud on the purchaser's rights.¹⁷

If a village corporation has made a contract which is *ultra vires*, a bill in equity brought by itself for the specific performance of the same cannot be maintained. And when a village corporation is only invested with power "to raise such sums of money as may be sufficient for the support of a reasonable

¹⁴ *Chicago, Kalamazoo & Saginaw Ry. Co. v. Lane*, 150 Mich. 162, 113 N. W. 22, 14 Det. L. N. 532.

¹⁵ *Tidewater Ry. Co. v. Hurt*, 109 Va. 204, 63 S. E. 421.

¹⁶ *Deits v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

¹⁷ *Tidewater Ry. Co. v. Hurt*, 109 Va. 204, 63 S. E. 421.

number of hydrants, in case water is brought into its limits in a suitable manner and sufficient quantity, and suitable fire engines, engine houses, hose, buckets, hooks and ladders, and provide a sufficient quantity of water in the different parts of said corporation for the extinguishment of fire and for organizing and maintaining within its limits an efficient fire department," and has no power to raise money for any other purpose, such corporation has no authority to enter into a contract with a water company providing that at expiration of a term of years the corporation should have the right to purchase the water company's entire plant, at an appraised value to be fixed by three appraisers, chosen, one by the corporation, one by the water company, the third by these two, and on payment of the price so determined, that the water company should transfer to the corporation its entire plant, and if such corporation does enter into such a contract it is *ultra vires*.¹⁸ A bill in equity to compel specific performance of a contract between an individual and a State cannot, against the objection of the State, be maintained in the Federal Courts.¹⁹

§ 438. Specific Performance—Discretion of Court.

All applications for specific performance are addressed to the sound discretion of the court, regulated by established principles. The contract must not only be distinctly proved, but must be clearly and distinctly ascertained. It must be reasonable, certain, legal and mutual, and upon a valuable or least meritorious consideration, and the party seeking performance must not have been backward, but ready, desirous, prompt and eager.²⁰ But specific performance though a matter of grace rather than of right, will not be denied where complainant, a railroad company, would be compelled either to abandon its road or take proceedings for condemnation, with its consequent risks, and

¹⁸ Phillips Village Corporation v. Phillips Water Co., 104 Me. 103, 71 Atl. 474.

¹⁹ Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. ed. 458.

²⁰ Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 61 S. E. 770.

specific performance will give each party what was contracted for without injustice to either.²¹

The recital, in a contract between a railroad company and a landowner for the purchase of a right of way, that the company proposes to build a railroad "from the West Virginia line, at or near New River through Southern Virginia to tide water," constitutes only an inducement to the contract, the truth or falsity of which would exert proper influence with the court in exercising its discretion in granting, or refusing specific performance, but does not impair the force or effect of the contract where the recital is made in good faith and is true.²²

§ 439. Specific Performance—Contract to Sell Corporate Stock.

Equity may compel specific performance of a contract to sell corporate stock, where the value of the stock is not easily ascertainable, or where the stock is not readily obtainable elsewhere, or where there is some reasonable cause for the buyer requiring a delivery of the stock contracted for; but where the stock contracted for is easily obtained in the market, and there are no particular reasons why the buyer should have the particular stock, he is left to his action for damages. And before specific performance of an agreement to take or deliver corporate stock may be decreed, it is necessary that the agreement should not involve any breach of trust, nor include the performance by either party of obligations the performance of which equity cannot practically enforce. And while a contract for the sale of corporate stock, which binds the buyer to furnish to the seller the personal services of himself and wife, involves a correlative duty on the part of the seller to employ the buyer and his wife, so that there is a mutuality of obligations; still where such contract obligates the buyer of the stock to furnish to the seller such personal services and the seller to employ said parties, it cannot be specifically enforced at the suit of the buyer

²¹ *Chicago, Kalamazoo & Saginaw Ry. Co. v. Lane*, 150 Mich. 162, 113 N. W. 22, 14 Det. L. N. 532.

²² *Tidewater Ry. Co. v. Hurt*, 109 Va. 204, 63 S. E. 421.

to compel the delivery of such stock, where the seller cannot maintain a suit to compel the specific performance of the buyer's agreement to render the personal services of himself and wife.²³

An oral contract between two persons to purchase shares of stock of a corporation does not lack mutuality, where by its terms it provides that the purchase is to be made by either of the parties as opportunity might offer, for their mutual benefit, and that after the shares were purchased they were to be equally divided between the parties, each paying one-half of the purchase price. In such a case either party has the right in the exercise of good faith to pay what he deems proper for the stock, and the other party must pay one-half of the money expended. If it appears that the stock is not procurable in the market, and that its pecuniary value is not readily ascertainable, the contract may be specifically enforced. The person purchasing the stock and refusing to share it with the other party, is a trustee *ex maleficio* of the other party, and equity will enforce the trust.²⁴ Where one corporation agrees with another to issue to each of its stockholders new stock, share for share, upon surrender of the old stock, in consideration of the transfer by the latter to the former of all its assets and business, an action lies for specific performance of such contract, and a stockholder of the old company may properly institute such suit for his own benefit without joining the company or the other stockholders, and an averment that it is for the benefit of such of them as may come in and defend is not necessary.²⁵ Where the original subscribers to the stock of a corporation agree that in case any of them might desire to sell their stock, they shall first offer it to the remaining subscribers, and it appears that of the remaining three original subscribers two had sold their stock to other parties in violation of the agreement, such an agreement cannot be set up against the other one of the three original subscribers when he attempts to compel a third

²³ *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803.

²⁴ *Sherman v. Herr*, 220 Pa. St. 420, 69 Atl. 899.

²⁵ *Fletcher v. Newark Teleph. Co.*, 55 N. J. Eq. 47, 35 Atl. 903.

party to deliver to him stock which such third party had contracted to deliver.²⁸

In another case a contract for the purchase of stock in a corporation owning a hotel stipulated that the buyer should be employed as the manager of the hotel at a fixed salary, and that in case the hotel made a profit he should be entitled to have one-fourth thereof credited on the balance due on the stock contracted for. He was removed from his position as manager, and brought a suit to specifically enforce the contract by requiring his restoration to the position of manager and for the transfer and delivery to him of the corporate stock. There was no allegation that any profits had accrued or were due, nor was there any claim made for damages, and he made no tender of performance by alleging his willingness and ability to pay any balance that might be found due after applying profits to the liquidation of the debt. It was held that the court was without authority to enter a decree providing for the appointment of a referee to take an accounting of damages and of the earnings and profits of the hotel, and for the application of the same on the stock purchased, and the payment of the balance, if any, to the buyer. Said contract also recited that plaintiff had agreed to purchase from defendant a fourth interest in hotel property for a specified sum, and bound defendant to procure for plaintiff the position of manager of the hotel at a specified compensation, provided defendant obtained control of all the stock of the corporation owning the hotel, and, should he fail to get control, a new corporation should be formed, of which plaintiff should have a fourth of the stock and defendant three-fourths. It was held that the contract did not create a partnership in the hotel business and created only a personal obligation on the part of defendant to sell a fourth interest, and plaintiff, on being removed from the position of manager, could not, in a suit for the specific performance of the contract, compel his restoration to such position. Said contract also gave the buyer an option to purchase, within a specified time, corporate stock for a fixed price on payment of a part of the price in cash and on

²⁸ *Sherman v. Herr*, 220 Pa. St. 420, 69 Atl. 899.

the payment of the balance within a specified time; the seller to retain the stock as security for the payment of the balance. The buyer made a written offer to pay the cash part of the price for the stock. He did not show that he was able at that time, or at any time since, to pay such part of the price, and he did not pay such part into court. It was held, that he was not entitled to compel specific performance of the contract by compelling the seller to deliver to him the stock, at least in the absence of a tender or a readiness or willingness to pay the balance of the price.²⁷

²⁷ Deitz v. Stephenson, 51 Ore. 596, 95 Pac. 803.

CHAPTER XXV

PENALTIES—OFFENSES—CRIMINAL LIABILITY OF CORPORATIONS

- § 440. Penalties—Suit by Consignee to Recover.
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457. Sufficiency of Indictment.
458. Discrimination in Rates—Rebates—Elkins Act—Criminal Law—Place of Trial—Single Continuous Offense.

§ 440. Penalties—Suit by Consignee to Recover.

Where a State statute required a carrier to settle, within a

specified time, claims for loss of or damage to freight while in its possession within that State, and a failure to adjust and pay such claim within the prescribed period subjects each carrier so failing to a specified penalty for each and every failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction, and also provided that unless such consignee or consignees recovered in such action the full amount claimed, no penalty should be recovered, but only the actual amount of the loss or damage,¹ it was held in certain cases brought to test the validity of such enactment when applied to claims for loss or damage to interstate freight, that such statute was not, in the absence of legislation by Congress on the subject, an unwarrantable interference with interstate commerce, and was not unconstitutional under the commerce law as to goods shipped from without the State but which actually were in the possession of the carrier within the State. It was also held that a State statute in aid of the performance of the duty of an interstate carrier which would exist in the absence of the statute, which does not obstruct the carrier, and which relates to the delivery of goods actually in the possession of the carrier within the State, is not void as a regulation or obstruction to interstate commerce, in the absence of congressional legislation on the subject.²

§ 441. Right to Inspect Books of Corporation—Penalties for Refusal to Allow.³

A stockholder of a corporation has the right to inspect the books of the company, at a proper time and in a proper way, even though his only object be to ascertain whether the business has been properly conducted; and the fact that he is interested in a competing company is not a good and sufficient reason for refusing him.⁴ So an executor and sole legatee holding half the

¹ Act No. 50 of S. C. of February 23, 1903.

² *Atlantic Coast Line Ry. Co. v. Masursky*, 216 U. S. 122, 30 Sup. Ct. —, 54 L. ed. —, aff'g 78 S. C. 36.

³ See § 362, herein.

⁴ *Hodder v. George Hogg Co.*, 223 Pa. St. 196, 72 Atl. 553.

capital stock of a business corporation and not interested in any rival business and not adverse to the interests of the corporation is entitled to an examination of its books and may enforce that right by mandamus.⁵ Neither a corporation nor its officers or agents can be held liable for a statutory penalty for refusal to allow an inspection of the books of the corporation when they do not refuse so to do within the intent of the statute.⁶

§ 442. Telegraph and Telephone Companies—Discrimination—Penalties.⁷

By acceptance of the Post Roads Act, the accepting telegraph companies are obligated to give preference to government busi-

When stockholder has right to inspect corporation's books, see the following cases:

United States: Chable v. Nicaragua Canal Const. Co., 59 Fed. 846.

Alabama: Foster v. White, 86 Ala. 467, 6 So. 88.

Illinois: Stone v. Kellogg, 165 Ill. 192, 46 N. E. 222, aff'g 62 Ill. App. 444; Matthews v. McClaughry, 83 Ill. App. 224.

Maryland: Weinhenmayer v. Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446.

Nebraska: Gerner v. Mosher, 58 Neb. 135, 46 L. R. A. 244, 78 N. W. 384.

New York: Steinway, In re, 159 N. Y. 250, 49 L. R. A. 461, 53 N. E. 1103, aff'g 52 N. Y. Supp. 343, 31 App. Div. 70; People v. Knickerbocker Trust Co., 77 N. Y. Supp. 1000, 38 Misc. 446; Coats, In re, 75 N. Y. Supp. 730, 73 App. Div. 178; Recknagel v. Empire Self-Lighting Oil-Lamp Co., 52 N. Y. Supp. 635, 24 Misc. 193.

Washington: State v. Pacific Brewing & Malting Co., 21 Wash. 451, 47 L. R. A. 208, 58 Pac. 584.

When stockholder not permitted to inspect corporation's books, see Clark v. Eastern Bldg. & Loan Assoc. (U. S. C. C.), 89 Fed. 779.

Who is not a stockholder so as to be entitled to inspect corporation's books, see State ex rel. Bulkley v. Whited & Wheless, 104 La. 125, 28 So. 922; Pray v. Todd, 75 N. Y. Supp. 947, 71 App. Div. 391; First Nat. Bank, In re, 60 N. Y. Supp. 1138, 44 App. Div. 635, aff'g 59 N. Y. Supp. 1042, 28 Misc. 662.

⁵ *Hastings, Matter of*, 112 N. Y. Supp. 800, 128 App. Div. 516, aff'd (mem.) 194 N. Y. 546, 87 N. E. 1120.

Constitutional right to inspect corporation's books includes personal representative of stockholder after his death. State ex rel. Burke v. Citizens' Bank, 51 La. Ann. 426, 25 So. 318.

⁶ *Losier v. Gas, Electric Light & Power Co.*, 69 N. Y. Supp. 247, 59 App. Div. 390. See *Kirkman v. Carlstadt Chemical Co.*, 74 N. Y. Supp. 865, 36 Misc. 822.

⁷ See *Joyce on Electric Law* (2d ed.), §§ 836-877a.

ness of the United States.⁸ If there is dissimilarity in the services rendered by a telegraph company to different persons, a difference in charges is proper, and no recovery can be had unless it is shown not merely that there is a difference in the charges, but that the difference is so great as, under dissimilar conditions of service, to show an unjust discrimination; and the recovery must be limited to the amount of the unreasonable discrimination.⁹ But a telegraph company fails to afford reasonable and equal facilities to all where it turns over its wire exclusively to a railroad company, and fails to provide another wire or a reasonably adequate number of wires to serve the public.¹⁰ An excessive charge for sending a telegram constitutes a discrimination rendering the company liable for the statutory penalty.¹¹ As a rule a telephone company is obligated to furnish its instruments and facilities to all persons willing to

⁸ *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, 1 Am. Elec. Cas. 373, per Mr. Chief Justice Waite; *Western Union Teleg. Co. v. Mayor of the City of New York*, 38 Fed. 552, 2 Am. Elec. Cas. 196, per Wallace, J.; *City Council of Charleston v. Postal Teleg. Cable Co.* (Ct. C. P. Charleston, S. C. 1891), 9 Ry. & Corp. L. J. 129, 3 Am. Elec. Cas. 56, 62-65, per Izlar, J. "It has put its lines at the service of the United States for postal, military and other purposes, and given preference to its business." *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 5 Am. Elec. Cas. 663, 664, 14 St. Ct. 1094, per Mr. Justice Shiras, aff'g 56 Fed. 419, 4 Am. Elec. Cas. 620. "By this action the company so accepting puts its lines at the service of the United States for postal, military and other purposes and gives precedence to its messages over all other business. It thus becomes an agent of the government." *Western Un. Teleg. Co. v. City Council of Charleston*, 56 Fed. 419, 4 Am. Elec. Cas. 621. See mem. decision, 163 U. S. 711, 41 L. ed. 309, 16 Sup. Ct. 1208. The Western Union Telegraph Company is, by virtue of such rights as it derived by acceptance of the Post Roads Act, a governmental agent. "The trial court was right in holding that the defendant is a governmental agent, but this only extended to its relations between the government and its agent." *State ex rel. Gottlieb v. Western Union Teleg. Co.*, 165 Me. 502, 65 S. W. 775, 8 Am. Elec. Cas. 390, 396, per Marshall, J.; a case as to taxation of franchise case affirmed; *Western Union Teleg. Co. v. State of Missouri*, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. 730.

⁹ *Western Union Teleg. Co. v. Call Publishing Co.*, 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. 561.

¹⁰ *Western Union Teleg. Co. v. Rosentreter*, 80 Tex. 406, 3 Am. Elec. Cas. 782, 791, 16 S. W. 25, per Marr, J.

¹¹ *Western Union Teleg. Co. v. McClelland* (Ind. App., 1906), 78 N. E. 672, under *Burns' Annot. Stat.*, 1901, §§ 5511, 5512.

accede to its terms, and to obey its reasonable rules and regulations.¹² So the refusal of a telephone company to connect the instrument of a subscriber with that of another patron renders it liable under a statute as to discrimination and partiality, as the duty imposed does not cease upon furnishing the instrument and connecting it with the exchange.¹³ Under a statute which provides that telephone companies shall supply all applicants for telephone facilities without discrimination, and imposes a penalty for each day's continuance of such discrimination, a complaint which alleges that defendant telephone company failed to furnish defendant with a telephone connection, after repeated application therefor, and "that by reason of the aforesaid discrimination and refusal" defendant had incurred a penalty, fails to state a cause of action constituting discrimination.¹⁴ And a penalty statute prohibiting discrimination by telephone companies applies to discrimination between applicants as well as patrons, and such companies cannot refuse to connect two subscribers.¹⁵ If the action is against a telephone company to recover a statutory penalty for failure to furnish telephone facilities, because plaintiff had not paid certain tolls and charges, an averment of nonenforcement of the

¹² *People, Postal Telegr. Cable v. Hudson R. Teleph. Co.*, 19 Abb. N. C. (N. Y.) 466, 10 N. Y. St. R. 282, 2 Am. Elec. Cas. 394. See *Chesapeake & P. Teleph. Co. v. Baltimore & O. Telegr. Co.*, 66 Md. 399, 59 Am. St. Rep. 167, 7 Atl. 809; *State, Webster v. Nebraska Teleph. Co.* (Webster Telephone Case), 17 Neb. 126, 22 N. W. 237, 52 Am. St. Rep. 404; *Commercial Union Telegr. Co. v. New England Teleph. & Telegr. Co.*, 61 Vt. 241; *Delaware & A. Telegr. & Teleph. Co. v. State Postal Telegr. Cable Co.*, 3 U. S. App. 30, 2 U. S. C. C. A. 1, 50 Fed. 677. Examine *American Rap. Telegr. Co. v. Connecticut Teleph. Co.*, 49 Conn. 352, 44 Am. St. Rep. 237*m*, and see note 5 L. R. A. 161.

¹³ *Central Un. Teleph. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; Ind. Rev. Stat. of 1894, § 5529. See Horner's Annot. Stat., Ind., 1901, §§ 4192*a*-4192*c*.

¹⁴ *Phillips v. Southwestern Telegr. & Teleph. Co.*, 72 Ark. 478, 81 S. W. 605, under *Laws*, 1885, chap. 107, § 11.

¹⁵ *Central Un. Teleph. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64, 6 Am. Elec. Cas. 694; § 5529, Rev. Stat. of Ind., 1894 (§ 2, p. 151, Acts of 1885); Rev. Stat. of 1881, § 115; Rev. Stat. of 1894, § 115; Acts of 1885, p. 151, § 2 (Rev. Stat. of 1894, § 5529). See Horner's Annot. Stat., Ind., 1901, §§ 4192*a*-4192*c*.

rule requiring such payment against a certain number of other patrons "who were in like situation with the plaintiff" is a mere conclusion and is insufficient to show discrimination, it not being shown that delinquent patrons had refused to pay.¹⁶

§ 443. Offenses Against United States.

There are no common-law offenses against the United States.¹⁷

In a case where a criminal information was brought by the United States,¹⁸ against a bridge company, its president and managers, a verdict of guilty was found, and the defendant was adjudged to pay to the United States a fine of one thousand dollars and the cost of prosecution. From that judgment the case was taken directly to the Federal Supreme Court, where the judgment was affirmed. The information charged the bridge company with having willfully failed, refused and neglected to comply with an order of the Secretary of War requiring certain alterations in the bridge by reason of its being an unreasonable obstruction to the free navigation of one of the navigable waterways of the United States. Certain constitutional questions were raised and it was held that: (1) Congress may, in order to enforce its enactments, clothe an executive officer with power to ascertain whether certain specified conditions exist and thereupon to act in a prescribed manner, without delegating, in a constitutional sense, legislative or judicial power to such officer; (2) under its paramount power to regulate commerce, Congress can require navigable waters within a State to be freed from unreasonable obstructions, and it is not a delegation of legislative or judicial power to charge the Secretary of War with the duty of ascertaining, under a general rule applicable to all navigable waters and upon notice to the parties in interest, whether obstructions are unreasonable; (3) an act of Congress which invests the Secretary of War with power to require the removal of obstructions to navigation after notice to parties in interest and opportunity to be heard and reasonable

¹⁶ *Irvin v. Rushville Co-operative Teleph. Co.*, 161 Ind. 524, 69 N. E. 258.

¹⁷ *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. 764.

¹⁸ Under § 18 of the River & Harbor Act of March 3, 1899.

time to make alterations in the obstruction,¹⁹ does not invest the Secretary with arbitrary power beyond constitutional limitations; (4) to require, after notice and hearing, alterations to be made within a reasonable time and in a bridge over navigable waters so as to prevent its being an obstruction to navigation, is not taking of private property for public use which, under the Constitution, must be preceded by compensation to the owners of the bridge; (5) the erection of a bridge over navigable waters within a State by authority of the State is subject to the paramount authority of Congress to regulate commerce among the States and its right to remove unreasonable obstructions to navigation; (6) the mere silence of Congress, and its failure to interfere to prevent the construction under State authority of an obstruction to navigation does not prevent it from subsequently requiring the removal of the obstruction or impose upon the United States a constitutional obligation to make compensation therefor; (7) it is for Congress, under the Constitution, to regulate the right of navigation and to declare what must be done to clear navigation from obstructions; and where this has been done in the manner required by Congress it is not the province of the jury, on the trial of one refusing to remove obstructions, to determine whether the removal was necessary; (8) an act will not be declared unconstitutional merely because an executive officer might, in another case, act arbitrarily or recklessly under it. If such a case arises the courts can protect the rights of the government or persons which are based on fundamental principles for the protection of rights of property.²⁰ Where a Federal law is applicable requiring consent of the Federal Government there is concurrent or joint jurisdiction of the State and National governments over the erection of structures obstructing navigation of a navigable stream wholly within a State.²¹

¹⁹ Section 18 of the River & Harbor Act of March 3, 1899, 30 Stat. 1151.

²⁰ *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 30 Sup. Ct. —, 54 L. ed. —. Mr. Justice Brewer dissented. See § 56, herein.

²¹ *North Shore Boom Co. v. Nicomen Boom Co.*, 212 U. S. 406 (*Cummings v. Chicago*, 188 U. S. 410; *Montgomery v. Portland*, 190 U. S. 89); writ of error, 40 Wash. 315, dismissed.

§ 444. Power of Congress—To What Extent Corporation Can Be Charged Criminally for Agents' Acts—Common Carriers—Rates.

Congress can impute to a corporation the commission of certain criminal offenses and subject it to criminal prosecution therefor. While corporations cannot commit some crimes, they can commit crimes which consist in purposely doing things prohibited by statute, and in such case they can be charged with knowledge of acts of their agents who act within the authority conferred upon them.²² So under the laws of a State a corpora-

²² *New York Cent. & Hudson River Ry. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. ed. 613 (a case of indictment and conviction in Circuit Court of railroad company and its assistant traffic manager for payment of rebates; imposition of fines and writ of error). The court, per Mr. Justice Day, said: "It is contended that these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. And it is further contended that these provisions of the statute deprive the corporation of the presumption of innocence,—a presumption which is part of due process in criminal prosecutions. It is urged that, as there is no authority shown by the board of directors or the stockholders for the criminal acts of the agents of the company in contracting for and giving rebates, they could not be lawfully charged against the corporation. As no action of the board of directors could legally authorize a crime, and as, indeed, the stockholders could not do so, the arguments come to this: that, owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case. Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (Anonymous, 12 Mod. 559) that 'a corporation is not indictable, although the particular members of it are.' In Blackstone's Commentaries, chap. 18, § 12, we find it stated: 'A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities.' The modern authority, universally, so far as we know, is the other way. In considering the subject, Bishop's New Criminal Law, § 417, devotes a chapter to the capacity of corporations to commit crime, and states the law to be: 'Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend

tion may in many instances be charged criminally with the unlawful purposes and motives of agents through whom it conducts its business, while they are acting in its behalf, so long as they act within the scope of their authority, real or apparent.²³

to do it, and can act therein as well viciously as virtuously.' Without citing the State cases holding the same view, we may note *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445, in which it was held that a corporation was subject to punishment for criminal contempt; and the court, speaking by Mr. Chief Justice Field, said: 'We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation can be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong.' It is held in England that corporations may be criminally prosecuted for acts of misfeasance as well as nonfeasance. *R. v. Great North of England R. Co.*, 9 L. B. 315. * * * It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawitz, *Priv. Corp.*, § 733; Green's *Brice*, *Ultra Vires*, 366. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy."

That corporation must suffer for agents' acts, see *State ex inf. Firemen's Fund Ins. Co.*, 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595. See § 317, herein.

²³ *People v. Rochester Ry. & Light Co.*, 195 N. Y. 102, 88 N. E. 22, aff'g 114 N. Y. Supp. 755, 129 App. Div. 843, which aff'd 112 N. Y. Supp. 362, 59 Misc. 347 (a case of indictment for crime of manslaughter in the second degree, held that corporation cannot be guilty of manslaughter). The court, per Hiscock, J., said: "The respondent has been indicted for the crime of manslaughter in the second degree, because, as alleged, it installed certain apparatus in a residence in Rochester in such a grossly improper, unskillful, and negligent manner that gases escaped and caused the death of an inmate. The demurrer to the indictment has presented the question whether a corporation may be thus indicted for manslaughter under § 193 of the Penal Code. Before proceeding to the interpretation of this specific provision, we shall consider very briefly the general question discussed by the parties, whether a corporation is capable of committing in any form such a crime as that of manslaughter. Of the correctness of the proposition urged in behalf of the people that it may do so, subject to various limitations, we entertain no doubt. Some of the earlier writers on the common law held that a cor-

In actions for tort a corporation may be held responsible for damages for the acts of its agent within the scope of his employment, even if done wantonly, recklessly or against the express orders of the principal.²⁴ A corporation is responsible for acts not within its agent's powers strictly construed, but assumed to be done by him when employing authorized powers, and in such case no written authority under seal is necessary. So the

poration could not commit a crime. Blackstone in his Commentaries, chap. 18, § 12, stated: 'A corporation cannot commit treason or felony or other crime in its corporate capacity, though its members may in their distinct individual capacities.' And Lord Chief Justice Holt (Anonymous, 12 Modern, 555) is said to have held that 'a corporation is not indictable, although the particular members of it are.' In modern times, however, the courts and text-writers quite universally have reached an opposite conclusion. A corporation may be indicted either for nonfeasance or misfeasance, the obvious and general limitations upon this liability being in the former case that it shall be capable of doing the act for nonperformance of which it is charged, and that in the second case the act for the performance of which it is charged shall not be one of which performance is clearly and totally beyond its authorized powers. Bishop's New Criminal Law, §§ 421, 422. The instances in which it has been held that a corporation might be liable criminally simply because it did or did not perform some act, and where no element of intent was supposed to be involved, are so familiar that any extended reference to them is entirely unnecessary. The latest authority in this State upholding such liability is found in the case of *People v. Woodbury Dermatological Institute*, 192 N. Y. 455, 85 N. E. 697, where it was held that a corporation might be punished criminally for disobeying the statute providing that 'any person not a registered physician who shall advertise to practice medicine, shall be guilty of a misdemeanor.' There was involved no question of intent, but simply that of disobedience of a statutory provision against doing certain acts. At times courts have halted somewhat at the suggestion that a corporation could commit a crime where the element of intent was an essential ingredient. But this doctrine, again with certain limitations, may now be regarded as established, and there is nothing therein which is either unjust or illogical. Of course, it has been fully recognized that there are many crimes so involving personal, malicious intent and acts so *ultra vires* that a corporation manifestly could not commit them. Wharton's Criminal Law (9th ed.), § 91; Morawitz on Private Corporations (2d ed.), §§ 732 *et seq.* But a corporation, generally speaking, is liable in civil proceedings for the conduct of the agents through whom it conducts its business so long as they act within the scope of their authority, real or apparent, and it is but a step further in the same direction to hold that in many instances it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf."

²⁴ See § 317, herein.

act of an agent exercising the authority of a corporation which is a common carrier to make rates for transportation may be controlled, in the interest of public policy, by imputing his act to the carrier itself and imposing penalties therefor upon the carrier.²⁵

§ 445. Police Power of States—Crimes and Penalties—Combinations in Restraint of Trade—Extent of Judicial Interference by Federal Courts.

The fixing of punishment for crime and penalties for unlawful acts is within the police power of the State, and the Federal Supreme Court cannot interfere with State legislation in fixing fines, or judicial action in imposing them, unless so grossly excessive as to amount to deprivation of property without due process of law. And as States have power to prevent unlawful combinations in restraint of trade they may provide the procedure for enforcing the same, subject only to the qualification that such procedure must not deny or conflict with fundamental or constitutional rights.²⁶ A State, in the absence of any statute by Congress, has plenary power in regard to navigable streams wholly within its boundaries, and obstructions in such streams, in the absence of statute, constitute no offense against the United States, and whether obstructions are unlawful under State law is not a Federal question.²⁷

§ 446. Corporation Criminally Liable—May Be Indicted.

A corporation may be indicted for a misfeasance as well as for

²⁵ *New York Cent. & Hudson River Ry. Co. v. United States*, 212 U. S. 481, 493, 500, 29 Sup. Ct. 304, 309, 53 L. ed. 613, 624 (a case of indictment, and conviction in Circuit Court of railroad company and its assistant traffic manager for payment of rebates; imposition of fines; writ of error). See also *Lake Shore & Michigan Southern R. R. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. 261; *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. 296.

²⁶ *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'g 106 S. W. 918. Action to forfeit permit of foreign corporation to do business in State and to assess penalties for violation of antitrust laws of State. As to excessive penalties, see *Young, Ex parte*, 209 U. S. 123.

²⁷ *North Shore Boom Co. v. Nicomen Boom Co.*, 212 U. S. 406, 53 L. ed. 574, 29 Sup. Ct. 355; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 131, — L. ed. 629, 8 Sup. Ct. 811. Writ of error, 40 Wash. 315, dismissed.

a nonfeasance.²⁸ So railroad corporations are liable to an indictment for the act of their officers and agents.²⁹ So a corpora-

²⁸ *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray (68 Mass.), 336. The court, per Bigelow, J. (at pp. 345, 346), said: "The indictment in the present case is for a nuisance. The defendants contend that it cannot be maintained against them, on the ground, that a corporation though liable to indictment for nonfeasance, or an omission to perform a legal duty or obligation, are not amenable in this form of prosecution for a misfeasance, or the doing of any act unlawful in itself and injurious to the rights of others. There are dicta in some of the early cases which sanction this broad doctrine, and it has been thence copied into text-writers, and adopted to its full extent in a few modern decisions. But if it ever had any foundation it had its origin at a time when corporations were few in number, and limited in their powers, and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it; and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals. To a certain extent, the rule contended for is founded in good sense and sound principle. Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offenses against the person. But beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses."

"There is no doubt whatever in my mind of the soundness of the contention of counsel for the defendant that the peculiar form of the statute covering this case makes the offense a felony; but I am equally well satisfied that, because it makes such offense a felony, it is no answer to the charge, and that a corporation may be punished upon indictment for a felony as it may for a misdemeanor. It is urged in argument that, if the crime stated in the indictment is a felony, then the corporation could not be punished, and that, therefore, the charge by the grand jury is without force or effect. It is true

²⁹ *State v. Vermont Central Rd. Co.*, 27 Vt. 103.

tion may be punished criminally for peddling through the medium of an unlicensed agent.³⁰ So the general manager of a corporation in active charge of its affairs and with knowledge of the illicit business may be held criminally liable for such offense.³¹ A corporation may also be charged with an offense which only involves an intention to do a prohibited act, and it may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporate action it does the prohibited act, as in case of the violation of an eight-hour law.³²

A corporation is not, merely because it is a creature of the law without physical existence, immune from indictment and criminal prosecution for nonfeasance in neglecting to perform duties which it owes to the public.³³ But while corporations in accepting their charters, impliedly agree, upon condition of forfeiture, to conduct their business conformably to the laws of the State, and not to commit crimes, still they are indictable only where a statute so provides; but their charters may be forfeited at the suit of the State.³⁴ In case a statute imposes a fine or penalty for a person or unincorporated association or

that a corporation cannot be imprisoned or hanged, but a corporation can be fined just as a natural person can, when it does any act in the line of its business resulting in a violation of the law. If, in the course of its business, it kill a person, then if the law fix a fine or damages for such unlawful killing, even though it were a felony, the law could be enforced for the payment of such fine, and the property of the corporation made to answer; and where life is taken by a corporation in pursuing its business, and it is compelled to answer civilly because of such wrongful death, there is no good reason why it may not be required to answer criminally for the same act done in the line of its business, if the law so provides. Indeed, it seems from a very slight investigation of the question that this has practically been the law always. There are a few old cases that go to the effect that a corporation cannot be punished for a felony, but all the more modern cases are the other way."

United States v. Alaska Packers' Assn., 1 Alaska R. 217, per Brow, Dist. J.

³⁰ *Crall & Ostrander's Case*, 103 Va. 855, 49 S. E. 638. See also *Standard Oil Co. v. Commonwealth*, 107 Ky. 606, 21 Ky. L. Rep. 1339, 55 S. W. 8.

³¹ *Crall's Case*, 103 Va. 862, 49 S. E. 1038.

³² *United States v. John Kelso Co.* (U. S. C. C.), 86 Fed. 305.

³³ *Southern Railway Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203, 54 S. E. 160.

³⁴ *State ex rel. v. French Lick Springs Hotel*, 42 Ind. App. 282, 82 N. E. 801, 85 N. E. 724.

company to assume a corporate name in order to solicit business, such statute is not violated by merely using a corporate name without any fraudulent intent or injurious consequences to others.³⁵

§ 447. Indictment of Corporations for Nuisances.

A corporation and its officers may be indicted for carrying on a business which constitutes a nuisance;³⁶ or for its negligent acts whereby a nuisance arises, as in the case where water is permitted to escape and form stagnant pools;³⁷ or where it unlawfully obstructs a public highway or navigable stream;³⁸ or where a railroad corporation unlawfully constructs its road across a public highway;³⁹ or where it permits its engines and cars to remain thereon for a period longer than is reasonably necessary for a safe crossing;⁴⁰ or where they build their station houses in highways, which they merely cross with their railroad, and the location of which they do not change.⁴¹

Again, if a railroad company habitually runs its trains over a highway crossing at an unreasonable and unsafe rate of speed without giving reasonable and proper signals of their approach for the protection of life and property, it may be indicted for committing a public nuisance; but all the matters necessary to show the illegality of the company's action must be stated in the indictment. A bill of particulars cannot take the place of what must affirmatively appear on the face of the indictment. An indictment, however, charging a railroad company with the frequent and rapid passing and repassing of its trains over a highway, whereby the same was obstructed and rendered

³⁵ *People v. Rose*, 219 Ill. 46, 76 N. E. 42.

³⁶ *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

³⁷ *Delaware Division Canal Co. v. Commonwealth*, 60 Pa. St. 367, 100 Am. Dec. 570.

³⁸ *State v. Baltimore, Ohio & Chicago Rd. Co.*, 120 Ind. 298, 22 N. E. 307; *Commonwealth v. Massachusetts Rd. Corp.*, 4 Gray (70 Mass.), 22; *State v. White*, 96 Mo. App. 34, 69 S. W. 684.

³⁹ *Commonwealth v. Massachusetts Rd. Corp.*, 4 Gray (70 Mass.), 22.

⁴⁰ *State v. Western North Carolina Rd. Co.*, 95 N. C. 602.

⁴¹ *State v. Vermont Central Rd. Co.*, 27 Vt. 103.

dangerous, charges no offense either under the statute law of Pennsylvania, or at common law. With the statutory permission given to railroad companies to cross public highways with their tracks, there necessarily goes the right to frequently cross them, if the needs of the public for whom railroad companies are incorporated require the frequent movement of trains; and this is so of their speed.⁴²

§ 448. Insurance Companies—Combinations—Conspiracies—Insurance as “Commodity”—When and When Not Indictable Offenses:

Insurance is a commodity within the meaning of the Iowa Code⁴³ prohibiting the formation of combinations between individuals or corporations to regulate or fix the price of “oil, lumber, coal * * * or any other commodity,” and a compact between local agents in a city to fix rates upon all risks therein, imposing certain penalties for taking of risks at less rates than those fixed by the association is within the inhibition of said Code so forbidding the formation of combinations or confederations to regulate the price of any commodity.⁴⁴

Under a Kentucky decision it is not an indictable offense to conspire to fix insurance rates, either by virtue of the statute⁴⁵ against conspiracies to regulate the prices of “merchandise, manufactured articles or property of any kind,” or by the common law as it existed prior to the fourth year of King James I.⁴⁶

§ 449. Criminal Offenses by Corporations—Employment of Children Under Certain Age—Penalties.

A State statute prohibiting the employment of children,⁴⁷ under the age of fourteen years in mills and factories, and pro-

⁴² *Commonwealth v. Baltimore & Ohio Ry. Co.*, 223 Pa. St. 23, 72 Atl. 78.

⁴³ Iowa Code, § 5454.

⁴⁴ *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428. *Examine State ex inf. Firemen's Fund Ins. Co.*, 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595.

⁴⁵ Section 3915, Ky. Stat.

⁴⁶ *Aetna Ins. Co. v. Commonwealth*, 106 Ky. 864, 25 Ky. L. Rep. 503, 45 L. R. A. 355.

⁴⁷ *Mills' Ann. Stats., Colo.*, § 413.

viding a penalty therefor, applies to corporations as well as to natural persons, and the fact that the statute provides for imprisonment if the fine imposed is not paid does not exempt a corporation from the penalty, but the fine may be collected by means provided for the collection of money judgments. So where a corporation, through its agent having general authority to hire and discharge employes, employed a child under the age of fourteen years to work in a cotton mill, the corporation is guilty and subject to the penalty therefor, notwithstanding instructions had been given by the company to such agent not to employ children under that age.⁴⁸

§ 450. Indictment—While a Corporation Might Be Liable for Misfeasance Under Certain Definitions of Manslaughter It Cannot Be Guilty of Latter Under New York Penal Code.

A definition of certain forms of manslaughter might be formulated which would be applicable to a corporation and make it criminally liable for various acts of misfeasance and nonfeasance when causing death. The Penal Code of New York, however,⁴⁹ defines homicide as "the killing of one human being by the act, procurement or omission of another," meaning another human being, and said Code⁵⁰ also makes "such homicide" manslaughter in the second degree under certain circumstances. Under these definitions a corporation cannot be guilty of manslaughter.⁵¹

⁴⁸ *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924.

⁴⁹ Section 179.

⁵⁰ Subd. 3, § 193.

⁵¹ *People v. Rochester Ry. & Light Co.*, 195 N. Y. 102, 88 N. E. 22, aff'g 114 N. Y. Supp. 755, 129 App. Div. 843, which aff'd 112 N. Y. Supp. 362, 59 Misc. 347 (a case of an indictment for crime of manslaughter in the second degree). The court, per Hiscock, J., said: "Within the principles thus and elsewhere declared, we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation, and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in homicide, and amongst which very probably might be included conduct in its substance similar to that here charged against the respondent. But this being so, the question still confronts us whether corporations have been so made liable for the crime of manslaughter

§ 451. Construction of Antitrust Act—What Prohibitions of Embrace—Intent of—What Are and Are Not Illegal Combinations Within.

The prohibitions of the Sherman Antitrust Law ⁵² do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affecting other citizens of the United States. And a conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the as now expressly defined, in the section alone relied on by the people, and this question we think must be decisively answered in the negative. The New York Penal Code, § 179, defines homicide as 'the killing of one human being by the act, procurement or omission of another.' We think that this final word 'another,' naturally and clearly means a second or additional member of the same kind or class alone referred to by the preceding words, namely, another human being, and that we should not interpret it as appellant asks us to, as meaning another 'person,' which might then include corporations. It seems to us that it would be a violent strain upon a criminal statute to construe this word as meaning an agency of some kind other than that already mentioned or referred to and as bridging over a radical transition from human beings to corporations. Therefore we construe this definition of homicide as meaning the killing of one human being by another human being. Section 180 says that: 'homicide is either: (1) murder; (2) manslaughter,' etc. Section 193 says that: 'Such homicide,—that is, 'the killing of one human being * * * by another,—is manslaughter in the second degree when committed 'without a design to effect death; * * * (3) by any act, procurement or culpable negligence of any person, which * * * does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.' Thus we have the underlying and fundamental definition of homicide as the killing of one human being by another human being, and out of this basic act thus defined and according to the circumstances which accompany it are established crimes of varying degree including that of manslaughter for which the respondent has been indicted. In the definition of these crimes as contained in the sections under consideration (§§ 183-193), we do not discover any evidence of an intent on the part of the legislature to abandon the limitation of its enactments to human beings or to include a corporation as a criminal. Many of these sections could not by any possibility apply to a corporation and in our opinion subd. 3 of § 193, relating to manslaughter manifestly does not. It is true that the term 'person' used therein may at times include corporations, but that is not the case here. The surrounding and related sections are not calculated to induce the belief that it has any such meaning, and the classification of manslaughter as a form of homicide and the definition of homicide already quoted forbid it."

⁵² Act of July 2, 1890, chap. 647, 26 Stat. 209, 210.

local law. So a statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation; and while a country may treat some relations between its own citizens as governed by its own law in regions subject to no sovereign, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done. These principles were applied in a case in the Federal Supreme Court in an action which had been brought by an Alabama corporation against a New Jersey corporation to recover threefold damages, under the above-mentioned act to protect trade against monopolies; the acts complained of being done with the intent to prevent trade and competition and to enable defendant to monopolize and restrain the trade and to maintain unreasonable prices. As a result of the defendant's acts done in a foreign country the plaintiff was deprived of his property in the same country and his supplies injured, and defendant had also compelled producers to come to his terms and had prevented the plaintiff from buying for export and sale. The Circuit Court dismissed the complaint, upon motion, as not setting forth a cause of action, and that judgment was affirmed in the Circuit Court of Appeals and also by the Supreme Court.⁵³

Where a number of manufacturers situated in different States engaged in manufacturing an article sold in different States, organize a selling company through which their entire output is sold, in accordance with an agreement between themselves, to such persons only as enter into a purchasing agreement by which their sales are restricted, the effect is to restrain and monopolize interstate and foreign trade and commerce and is illegal under the Antitrust Act;⁵⁴ and it has so held in regard

⁵³ *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. 511.

⁵⁴ Act of July 2, 1890, chap. 647, 26 Stat. 209; U. S. Comp. Stat., 1901, pp. 3200 *et seq.* See next following note.

to a combination of wall paper manufacturers.⁵⁵ Under the Interstate Commerce Act where a shipper pays the legal rate on numerous shipments and at intervals receives a rebate from the carrier there is a separate and complete offense on each payment and not one continuous offense, although all the payments were made under one agreement.⁵⁶

§ 452. Construction of Elkins Act—Criminal Intent—Accepting Rebates—When Carrier Liable as Party to Joint Rate.

While intent is to some extent essential in the commission of crime, and without determining whether a shipper honestly paying a reduced rate in the belief that it is the published rate is liable under the statute, it is held that shippers who pay such a rate with full knowledge of the published rates, and contend that they have a right so to do, commit the offense prohibited in the Elkins Act, and are subject to the penalties provided therein, even though their construction be a mistake of law.⁵⁷ While criminal statutes are not to be enlarged by construction, and a crime must be clearly defined in its terms, they are to be reasonably construed with a view to effecting the purpose of their enactment, and this applies to that provision of the Elkins Act ⁵⁸ which relates to published rates and the conclusiveness of such rate as a legal rate in any prosecution under said enactment; said provision not being narrowly construed as one relating to evidence but as bringing

⁵⁵ *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. ed. 486, aff'g 148 Fed. 939. The remedies given by the Antitrust Act of 1890 are three in number: First, a criminal prosecution; second, a forfeiture of property; and, third, an action by any person injured to recover threefold damages. The defendant sought none of these remedies.

⁵⁶ *New York Cent. & Hudson River Ry. Co. v. United States*, 212 U. S. 481, 500, 29 Sup. Ct. 304, 309, 53 L. ed. 613, 624 (a case of indictment and conviction in Circuit Court of railroad company and its assistant traffic manager for payment of rebates; imposition of fines; writ of error).

⁵⁷ *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. 428, aff'g 153 Fed. 1 (a case of conviction for rebates).

Criminal intent, see *State ex inf. v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595.

⁵⁸ Act of Feb. 19, 1903, chap. 708, 32 Stat. 847, § 1; U. S. Comp. Stat. Supp., 1903, p. 363; U. S. Comp. Stat. Supp., 1907, p. 880; U. S. Comp. Stat. Supp., 1909, p. 1138.

all carriers who have participated in any rate filed or published within the terms of the act, as much so as if the tariff had been actually published and filed by such participating carriers. A carrier, therefore, under said Elkins law can be prosecuted for the offense of rebating where it is a party to a joint rate although it has not filed or published the same.⁵⁰

§ 453. Construction of Elkins Act—"Device" to Obtain Rebates.

A device to obtain rebates to be within the prohibition of the Interstate Commerce Act,⁶⁰ and the Elkins Act ⁶¹ need not necessarily be fraudulent. The term "device" as used in those statutes includes any plan or contrivance whereby merchandise is transported for less than the published rate, or any other advantage is given to, or discrimination practiced in favor of the shipper.⁶²

§ 454. Penal Statute—Retroactive Effect—Liability Under, of Party Carrying Out Illegal Agreement Executed Prior to Its Passage.

Even though it would be giving a penal statute a retroactive effect to make it apply to an unlawful agreement executed

⁵⁰ *United States v. New York Central & Hudson River Rd. Co.*, 212 U. S. 509, 29 Sup. Ct. 313, 53 L. ed. 629. A proceeding in the Federal Supreme Court under the act of March 2, 1907, chap. 2564, 34 Stat. 1246; U. S. Comp. Stat. Supp., 1909, p. 220 ("an act providing for writs of error in certain instances in criminal cases") permitting the government to bring to said Supreme Court a case where the court below sustains an indictment, in which the judgment involves the construction of a Federal statute upon which the indictment is founded. The effect of the charges in the indictment was that defendant did unlawfully and willfully give a rebate and concession in violation of the act to regulate commerce, whereby the property was transported by the corporation charged at a less rate than that named in the tariffs published and filed by said common carrier as required by the act to regulate commerce and the acts amendatory thereof and supplemental thereto.

⁶⁰ Act of March 2, 1889, 25 Stat. 857; U. S. Comp. Stat., p. 3161.

⁶¹ Act of Feb. 19, 1903, chap. 708, 32 Stat. 847; U. S. Comp. Stat. Supp., 1903, pp. 363-366; U. S. Comp. Stat. Supp., 1907, pp. 880 *et seq.*; U. S. Comp. Stat. Supp., 1909, pp. 1138 *et seq.*

⁶² *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. 428, aff'g 153 Fed. 1, a case of conviction for rebates.

prior to the passage of the act by defendant's predecessor in interest, such defendant is subject to conviction for violating the act after its enactment by making itself a party to and carrying out its illegal provisions.⁶³

§ 455. State Jurisdiction Over Violation of Antitrust Law Where Agreement Made Out of State—Extraterritorial Effect of Conspiracy, etc., Statute.

Although an agreement to violate the antitrust law of a State may be made outside of the State, if the parties thereto or their agents execute it or attempt so to do, within the State, they are under the jurisdiction of the State and their conviction for such acts is not without due process of law.⁶⁴ The Antitrust Act of Arkansas which provides that any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in said State, or any partnership or individual who shall create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding to fix or limit the price or premium to be paid for insuring property against loss or damage by fire shall be deemed and adjudged guilty of a conspiracy to defraud, etc.,⁶⁵ does not apply to pools or combinations formed outside of the State, and not intended to affect and which do not affect, persons or property or prices of insurance in that State.⁶⁶

⁶³ *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'g 106 S. W. 918, an action to forfeit permit of foreign corporation to do business in State, and to assess penalties for violation of Antitrust laws of State.

Antimonopoly Act; when action by attorney-general against combination formed prior to passage of act of N. Y., 1899, chap. 690, is not too late, see *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, 67 N. Y. Supp. 492, 55 App. Div. 245, rev'g 66 N. Y. Supp. 129, 32 Misc. 1.

⁶⁴ *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'g 106 S. W. 918. Action to forfeit permit of foreign corporation to do business in the State and to assess penalties for violation of antitrust laws of State.

⁶⁵ Acts Ark., 1899, p. 50.

⁶⁶ *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 45 L. R. A. 348, 51 S. W. 633.

§ 456. Constitutional Law—Elkins Act—Liquor Laws—Regulation of Carriers—Excessive Fines.

Congress has power to so regulate interstate commerce as to secure equal rights to all engaged therein, and the Elkins Act⁶⁷ is not unconstitutional because it imputes to the corporation, and makes it criminally responsible for acts violative of the Interstate Commerce Act done by its agent. So the court will recognize that the greater part of interstate commerce is conducted by corporations, and it will not relieve them from punishment because at one time there was a doctrine that corporations could not commit crime. And even if a statute relating both to individuals and corporations deprives an individual of the presumption of innocence and makes him responsible for the acts of another, the question of the constitutionality of such statute on that ground cannot be raised by a corporation; and where, as in the case of the Elkins Act,⁶⁸ there is no doubt that Congress could have enacted the statute as to corporations, even if it could not as to individuals, it is valid as to corporations.⁶⁹

A statute of Kentucky, making penal all shipments of liquor "to be paid for on delivery, commonly called C. O. D. shipments," and further providing that the place where the money is paid or the goods delivered shall be described to be the place of sale and that the carrier and his agents delivering the goods shall be jointly liable with the vendor, is as applied to shipments from one State to another an attempt to regulate interstate commerce and beyond the power of the State.⁷⁰

⁶⁷ Act of Feb. 19, 1903, chap. 708, 32 Stat. 847; U. S. Comp. Stat. Supp., 1903, pp. 363-366; U. S. Comp. Stat. Supp., 1907, pp. 880 *et seq.*; U. S. Comp. Stat. Supp., 1909, pp. 1138 *et seq.*

⁶⁸ Act of Feb. 19, 1903, chap. 708, 32 Stat. 847; U. S. Comp. Stat. Supp., 1903, pp. 363-366; U. S. Comp. Stat. Supp., 1907, pp. 880 *et seq.*; U. S. Comp. Stat. Supp., 1909, pp. 1138 *et seq.*

⁶⁹ *New York Cent. & Hudson River Ry. Co. v. United States*, 212 U. S. 481, 500, 29 Sup. Ct. 304, 309, 53 L. ed. 613, 624 (a case of indictment and conviction in Circuit Court of railroad company and its assistant traffic manager for payment of rebates; imposition of fines, writ of error), citing *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. ed. 81.

⁷⁰ *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. 606.

It is within the constitutional power of the General Assembly of a State to impose upon a railway company the duty of providing an adequate supply of pure drinking water for its passengers while journeying upon its cars, and to provide that the corporation shall be indicted, prosecuted and fined for a neglect of this public duty. In so far as the legislature has undertaken to inflict upon violators of a Penal Code,⁷¹ punishment other than fine, the punitive clause thereof is inoperative, because incapable of enforcement. Such section is not, however, violative of the constitutional requirement that all general laws shall have uniform operation; since all violators convicted thereunder must necessarily be punished in the same way, by fine and not otherwise.⁷² But where a State antitrust law fixed penalties at five thousand dollars a day, and after verdict of guilty for three hundred days, a defendant corporation was fined over one million six hundred thousand dollars, the Federal Supreme Court will not hold that the fine is so excessive as to amount to deprivation of property without due process of law, where it appears that the business was extensive and profitable during the period of violation, and that the corporation has over forty million dollars of assets and has declared dividends amounting to several hundred per cent.⁷³

§ 457. Sufficiency of Indictment.

In Nebraska, in order to charge a criminal violation of the statute of that State ⁷⁴ "to protect trade and commerce against unlawful restraints and monopolies" known as the "Anti-Trust Law" or the "Junkin Act," the indictment or information must allege that the facts complained of were in restraint

⁷¹ Ga. Penal Code, § 522.

⁷² *Southern Railway Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203, 54 S. E. 160.

⁷³ *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417, aff'd 106 S. W. 918. Action to forfeit permit of foreign corporation to do business and to assess penalties for violation of antitrust laws of State. *Examine Young*, Ex parte, 209 U. S. 123.

⁷⁴ Comp. Stat., 1907, § 1, Art. II, chap. 91a.

of trade within that State.⁷⁵ An indictment which clearly and distinctly charges each and every element of the offense intended to be charged, and which distinctly advises the de-

⁷⁵ *Howell v. State*, 83 Neb. 448, 120 N. W. 139. In this case, plaintiff in error, with more than fifty other persons was indicted by the grand jury for a violation of that part of Art. II, chap. 91a, Comp. Stat., 1907, relating to "Restraints, monopolies, rebates," commonly known as the "Antitrust Law," or the "Junkin Act." The prosecution grew out of the creation and existence of an organization, or alleged combination of dealers in coal and wood, under the name of the "Omaha Stock Exchange" for the purpose, as alleged, of fixing and establishing the price of fuels to be sold at retail. Plaintiff in error was found "guilty of restraint of trade as he stood charged in the information." A motion for a new trial was overruled and a judgment for conviction was entered and on error the judgment was reversed. The court, per Reese, C. J., after stating what we have above given in substance, says: "The first count charges the persons indicted with having 'unlawfully and feloniously joined themselves together and formed a trust and combination, the purpose and effect of which trust and combination is to restrain trade, to increase prices of coal and other fuels, to prevent competition in the sale of coal and other fuels, to fix the price of coal and other fuels, and to agree not to sell any coal and other fuels below a certain fixed figure, and that said defendants, naming them, are unlawfully aiding, advising, abetting, counseling and acting in pursuance to an agreement entered into by the members of said trust and combination, which trust and combination has unlawfully prevented, and does unlawfully prevent, competition in the sale of coal and other fuels, and have unlawfully agreed not to sell coal and other fuels below a certain figure, and have unlawfully prevented the sale of coal and other fuels below a certain fixed figure determined by said trust and combination with the intent then and there and thereby unlawfully, feloniously and arbitrarily to prevent competition and fix an established price at which said coals and other fuels are sold.' This count is attacked upon the ground that it is nowhere charged that the alleged trust, combination, or monopoly was with the intent and for the purpose of fixing and controlling prices of coal and other fuels in this State. The language of the statute under which the indictment was drawn provides: 'Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce within this State, is hereby declared to be illegal,' etc. It is evident that the object of the legislation was and is to make criminal the formation of such conspiracies within this State for the purpose of restraining or controlling trade or commerce within its borders, as there is no authority making such acts criminal when interstate commerce is to be thereby affected. It follows that that count of the indictment must be held incomplete and does not charge the commission of an offense. * * * In the construction of this statute and the article of the constitution copied, we are cited to the decision of the Supreme Court of the United States, in the case of *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. ed. 290, and by some it is thought to be decisive of this

fendant of what he is to meet at the trial is sufficient, and it has been so held in a case as to an indictment for accepting rebates prohibited by the Elkins Act, although the details of the device by which the rebates were received were not set out.⁷⁶

An indictment is sufficient if it specifically states the elements of the offense charged with sufficient particularity to fully advise the defendant thereof and so as to be pleaded in bar of any subsequent prosecution for the same offense.⁷⁷

question. In that case the members of the Kansas City Live Stock Exchange, a voluntary incorporated association, had agreed upon certain rules governing the transaction of their business, the truth of which prohibited the employment of any agent, solicitor, or employé except upon a stipulated salary, not contingent upon the commission earned, and that not more than three solicitors should be employed at one time by a commission, firm, or corporation, resident or nonresident of Kansas City. The eleventh rule prohibited the members from sending or causing to be sent a prepaid telegram or telephone message, quoting markets or giving information as to the condition of the same under the penalty of a fine. The ground upon which that case was decided was that the business of the Kansas City Live Stock Exchange was not interstate business, and therefore was not subject to control by act of Congress under which the suit had been instituted. What the decision would have been had that question been decided otherwise is subject to conjecture. It is true that the court holds that the rules referred to are not violative of the law of Congress, but this is based solely upon the fact that the business to which they refer is not interstate commerce. In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243, 20 Sup. Ct. 96, 108, 44 L. ed. 136, the same judge who wrote the opinion in the *Hopkins* Case says: 'The cases of *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. ed. 290, and *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. ed. 300, are not relevant. In the *Hopkins* case it was held that the business of the members of the Kansas City Live Stock Exchange was not interstate commerce and hence the act of Congress did not affect them.' The same is stated in substance, in *Montague & Co. v. Lowry*, 193 U. S. 39, 48, 24 Sup. Ct. 307, 48 L. ed. 608; *Swift & Co. v. United States*, 196 U. S. 375, 397, 25 Sup. Ct. 276, 49 L. ed. 518; and *Loewe v. Lawlor*, 208 U. S. 274, 297, 28 Sup. Ct. 301, 52 L. ed. 488. We thus refer to the *Hopkins* case at some length because it is insisted by some to be decisive of this case, which it clearly is not."

Indictment held sufficient; false entry in corporation's books by officer, see Commonwealth v. Dewhirst, 190 Mass. 293, 76 N. E. 1052.

Requisites of indictment; averment of corporate name necessary, see Standard Oil Co. v. Commonwealth, 29 Ky. L. Rep. 5, 91 S. W. 1128.

⁷⁶ *Armour Packing Co. v. United States*, 209 U. S. 56, 62 L. ed. 681, 28 Sup. Ct. 428, aff'g 153 Fed. 1 (a case of conviction for rebates).

⁷⁷ *New York Cent. & Hudson River Ry. Co. v. United States*, 212 U. S.

When, in a prosecution of an express company for a violation of such a statute by an interstate shipment, it is averred in the indictment or stipulated by the prosecution that the shipment and delivery were made and done by the express company in the usual course of its business as a carrier, testimony that the consignee did not order the goods or that the goods were held by the agent of the company at the place of delivery for a few days to accommodate the consignee is immaterial.⁷⁸

§ 458. Discrimination in Rates—Rebates—Elkins Act—Criminal Law—Place of Trial—Single Continuous Offense.

Transportation of merchandise by a carrier for less than the published rate is, under the Elkins Act,⁷⁹ a single continuing offense, continuously committed in each district through which the transportation is conducted at the prohibited rate, and is not a series of separate offenses, and the provision in the law making such an offense triable in any of those districts, confers jurisdiction on the court therein, and does not violate the Sixth Amendment to the Federal Constitution,⁸⁰ providing that the accused shall be tried in the State and district where the crime was committed.⁸¹

481, 29 Sup. Ct. 403, 53 L. ed. 613 (a case of conviction of railroad company in Circuit Court for payment of rebate and writ of error).

⁷⁸ *Adams Express Co. v. Kentucky*, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. 606.

⁷⁹ Act of Feb. 19, 1903, chap. 708, 32 Stat. 847; U. S. Comp. Stat. Supp., 1903, pp. 363–366; U. S. Comp. Stat. Supp., 1907, pp. 880 *et seq.*; U. S. Comp. Stat. Supp., 1909, pp. 1138 *et seq.*

⁸⁰ Art. III, § 2.

⁸¹ *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. 428, *aff'g* 153 Fed. 1 (a case of conviction for rebate).

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